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IN THE

Supreme Court of the United States

October Term, 1957

No. 840

GUMBINER THEATRICAL ENTERPRISES, INC.,
Petitioner,

v.

NATIONAL THEATRES CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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GUMBINER THEATRICAL ENTERPRISES, INC.,
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v.

NATIONAL THEATRES CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on November 7, 1957.

Citations to Opinions Below

The original opinion of the Court of Appeals and its opinion on rehearing are reported at 248 F. 2d 833. The opinion of the District Court is reported at 140 F. Supp. 909. The findings of fact, conclusions of law and order of dismissal of the District Court are not reported. All these opinions and the District Court's findings, conclusion and order are reprinted in the Appendix hereto.

Jurisdiction

The judgment of the Court of Appeals on rehearing, which vacated its original judgment of September 10, 1957, and affirmed instead of reversed the District Court's judgment of dimissal, was entered on November 7, 1957. A timely petition for rehearing as to the opinion of November 7, 1957, was filed by the petitioner, considered by the Court of Appeals, and denied by that court on December 6, 1957. This petition for a writ of certiorari is filed less than 90 days after the denial of rehearing. The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254(1).

Questions Presented

The decision of the court below is not only in conflict with the decision of other Courts of Appeals but is also in conflict with the applicable decisions of this Court and departs from the accepted and usual course of handling issues of fact upon which a jury trial has been demanded. Specific questions presented are the following:

1. Whether a plaintiff's right to a jury trial in a federal court on contested factual issues relating to the defendant's plea of the statute of limitations is unfairly denied by an appellate review which disregards the existence of the disputed issues of material facts.

2. Whether a corporate defendant which has at all prior times and for all other purposes consistently maintained the separateness and identity of its subsidiaries, may at its own instance pierce its own corporate veil as well as that of such subsidiaries for the sole purpose of escaping liability for its wrongs.

3. Whether a litigant having, to its benefit and advantage, solemnly represented the truth of certain matters lying peculiarly within its own knowledge to various courts by pleadings and by sworn testimony in support thereof, will thereafter, in subsequent judicial proceedings, when its interests are different, be permitted to repudiate its prior pleadings and sworn testimony.

Constitutional and Statutory Provisions Involved

Seventh Amendment to the Constitution of the United States:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States than according to the rules of the common law."

Sec. 48, New York Civil Practice Act:

> "The following actions must be commenced within six years after the cause of action has accrued:
>
> * * *
>
> 2. An action to recover upon a liability created by statute, except a penalty or forfeiture."

Sec. 13, New York Civil Practice Act:

> "LIMITATIONS WHERE CAUSE OF ACTION ARISES OUTSIDE OF THE STATE. Where a cause of action arises outside of this state, an action cannot be brought in a court of this state to enforce such cause of action after the expiration of the time limited by the laws either of this state or of the state or country where the cause of action arose, for bringing an action upon the cause of action. * * *"

Sec. 19, New York Civil Practice Act:

> "EFFECT OF DEFENDANT'S ABSENCE FROM STATE OR RESIDENCE UNDER FALSE NAME. If when the cause of action accrues against a person, he is without the state, the action may be commenced, within the time limited therefor, after his coming into or return to the state. If, after a cause of action has accrued

against a person, he departs from the state and remains continuously absent therefrom for the space of four months or more, or if, without the knowledge of the person entitled to maintain the action, he resides within the state under a false name, the time of his absence or of such residence within the state under such false name is not a part of the time limited for the commencement of the action. But this section does not apply in either of the following cases:

* * *

2. While a foreign corporation has had or shall have one or more officers in the state on whom a summons for such corporation may be served."

Paragraphs 335 and 338 Code of Civil Procedure of the State of California:

"Paragraph 335. PERIODS OF LIMITATION PRESCRIBED. The periods prescribed for the commencement of actions other than for the recovery of real property, are as follows * * *"

"Paragraph 338. (WITHIN THREE YEARS). Within three years:

1. An action upon a liability created by statute, other than a penalty or forfeiture."

Paragraph 351, Code of Civil Procedure of the State of California:

"Paragraph 351. EXCEPTION, WHERE DEFENDANT IS OUT OF THE STATE. If, when the cause of action accrues against a person, he is out of the state, the action maybe commenced within the term herein limited, after his return to the state, and if, after the cause of action accrues, he departs from the state, the time of his absence is not part of the time limited for the commencement of the action."

Statement of the Case

Petitioner, having on September 5, 1951, filed its complaint to recover damages for the loss of its Los Angeles theatre business and property (which loss, it charged, had been illegally engineered by respondent-defendant and other members of a conspiracy in violation of the federal anti-trust laws), moved for a separate trial of the issues raised by respondent-defendant's affirmative defense of the statute of limitations.[1]

Petitioner's motion for a separate trial on the limitations issue alone was granted. R. 12a. But although petitioner had incorporated a request for a jury trial on all issues in its complaint and had included a request for a jury trial in its motion for the separate trial on the issue of limitations, its requests were denied.[2] Similarly, when it renewed its request for a jury trial at the outset of the trial, that request was also denied. R. 16a. Thus the separate trial on the issues raised by the affirmative defense of the statute of limitations was held by the court without a jury.

Petitioner had, in its complaint, alleged that the applicable statutes of limitation of both New York (where

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[1] This case is a companion to one now pending before this Court on a petition for a writ of certiorari, No. 761, Oct. Term 1957, *National Theatres Corporation* v. *Bertha Building Corporation*. The two cases were consolidated in the courts below for purposes of trial and adjudication. The records in the cases were likewise consolidated. But, as appears hereinafter, the Court of Appeals rendered judgments of an opposite character in the two cases, thereby separating the proceedings as they reach this Court.

Since the records in the two cases were consolidated, petitioner in the instant case relies upon and adopts the certified record filed in this Court in No. 761. That record contains all the orders, judgments and other proceedings necessary to sustain the jurisdiction of the Court in this case and to permit this Court to consider the contentions advanced by this petitioner.

[2] Pet. App. 64a. No. 761 before this Court.

the action was filed) and California (where the action accrued) had been *tolled by reason of respondent-defendant's absence from both New York and California during the critical period between December 8, 1931 (when the cause of action accrued) and July 20, 1938.*[3]

Both the New York and California statutes of limitations contained provisions embodying the familiar principle that statutes of limitation shall not run in favor of a defendant who is absent from the state or whose entry is secret or clandestine or under circumstances not likely to give notice of his presence. It was therefore, incumbent upon respondent (which had the burden of proof as to its affirmative defense of limitations) to establish by a preponderance of the evidence that, under the applicable state law, it qualified and was entitled to escape the effect of such provisions of the statute of limitations of either New York (C. P. A. Sec. 19) or California (C. C. P. Sec. 351). Thus, the single and only issue to be resolved by the separate trial was whether or not respondent had satisfied its burden of proof in this connection.

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[3] In 1951, when petitioner's complaint was filed, there was no applicable federal statute of limitations. It was conceded that the applicable periods of limitation were six years under the New York statute of limitations (C. P. A. Sec. 48 (2)) and three years under the California statute of limitations (C. C. P. Sec. 338 (1)), which was made applicable by the borrowing provision in the New York statute (C. P. A. Sec. 13). July 20, 1938, was the date when, irrespective of respondent's presence or absence in either New York or California, the applicable statutes of both states began to be tolled by reason of the commencement and pendency of an action brought by the United States against respondent and its co-conspirators, *United States* v. *Paramount, et al.*, 66 F. Supp. 323 (S. D. N. Y., 1946), 334 U. S. 131 (1948).

Under Section 5 of the Claytor Act (15 U. S. C. 16), during the pendency of any anti-trust suit by the United States, the running of the applicable limitations statute is suspended as to every private right of action under the anti-trust laws provided the private suit is based in whole or in part on any matter complained of in the Government's action.

During the course of the trial, which was conducted by Judge Galston alone without a jury, petitioner introduced various pleadings and portions of the sworn testimony which respondent had offered and which had been admitted in prior judicial proceedings in both New York and California, (such pleadings and testimony as to New York are set forth in full in the Appendix attached, see pp. 63a to 72a). These pleadings and testimony were to the effect that the respondent had not been doing business and had no office or agent in either state and hence had not been subject to the jurisdiction of courts in those states. See, *e.g.*, R. 17a-48a.

Thus, petitioner introduced respondent's answer to the Government's 1938 complaint in *United States* v. *Paramount Pictures, Inc., et al.* (Equity No. 87-273, S. D. N. Y.), wherein the respondent specifically denied that it had a place of business at 444 West 56th Street, New York, N. Y., and averred that "its place of business" was at 2854 Hudson Boulevard, Jersey City, New Jersey. Pet. Ex. 37. See Appendix 71a to 72a.

Petitioner also introduced sworn testimony of respondent's secretary, offered by respondent in *Hillside Amusement Co.* v. *Warner Brothers Pictures, Inc., et al.* (Civil No. 13-77 S. D. N. Y.), that respondent "does not maintain an office in the territorial jurisdiction of the Southern District of New York" and that none of the officers, directors or employees of respondent maintain an office or transact any business on behalf of respondent in New York; and, from the same case, the sworn testimony of a member of the legal firm presently representing respondent, who stated under oath that of his own knowledge and at least since June 10, 1937, respondent had "no office or place of business at 444 West 56th Street or anywhere else in the Southern District of New York" and that respondent was not subject to the jurisdiction of the federal court there. R. 137a. See Appendix 63a to 69a.

The trial court, over petitioner's objections (R. 54a), permitted respondent at the trial to introduce evidence contradicting the prior sworn testimony of the character just indicated upon the explanation that all of such prior testimony was in reality a sham and part of a scheme by respondent to evade the payment of taxes in New York and California (R. 163a, 195a, 215a), whereby respondent had actually succeeded in evading the payment of state franchise and other local taxes in New York (R. 107a) and California (R. 150a) for a period of almost twenty years.

This scheme contemplated that respondent would endeavor to avoid the creation of any public record that might indicate it was doing business in New York or California (R. 195a, 215a). Thus, respondent's denial in its answer to the Government's original petition in the case of *United States* v. *Paramount, supra*, that respondent had a place of business in New York apparently induced a finding by the three-judge statutory court in the *Paramount* case that respondent's place of business was in Jersey City and avoided the appearance in the official reports of any finding in that case that respondent had a place of business at 444 West 56th Street, New York City, as the Government had originally contended. 70 F. Supp. 53, 58 (S. D. N. Y., 1947).

The trial court, as the Court of Appeals held, erroneously interpreted the pertinent state law as if the *only* requirement for avoiding the effect of the New York and California provisions suspending the running of their respective statutes of limitations was for respondent to establish that venue under the Clayton Act would have been properly laid as to the respondent in California or in New York. On the basis of this erroneous concept, the trial court held that the respondent had as a matter of law established its right to avoid the effect of the suspension provisions of the California statute of limitations. Re-

spondent's burden was found satisfied by its introduction of evidence which would have made it theoretically possible for a hypothetical judge in California before whom it would (hypothetically) have been offered to have found that venue under the Clayton Act would have been proper as to the respondent in California throughout the critical limitations period.

Having thus fallaciously found that petitioner's complaint was barred by the California statute of limitations, the trial court pointed out it was not "necessary, therefore, to discuss the New York statute of limitations, and the allegations of the plaintiffs in respect to their contention that the defendant was not doing business in New York during the critical years." 140 F. Supp. at 916.

Judge Galston accordingly granted respondent's motion for judgment on the pleadings and dismissed petitioner's complaint. And as an alternative ground for dismissing the complaint, the judge found that, within the interpretation given Section 12 of the Clayton Act, respondent was transacting business in California. 140 F. Supp. at 915-916.

Along with his opinion, Judge Galston filed extensive findings of fact and conclusions of law with respect to respondent's business activities in both New York and California. (See Appendix attached hereto, pages 36a to 62a.) From their face they reveal that they are made upon the same erroneous premise as to venue that vitiates his opinion.

The Court of Appeals, in its original opinion, pointed out that the issue of limitations at the trial before Judge Galston was "not to be treated merely as one of venue," the critical question being "whether the statute bars the suits." It reversed Judge Galston's judgment of dismissal and held that petitioner was entitled to a trial by jury on the disputed issue of whether the California three-year limitation statute had been tolled by reason of respondent's

absence from California during the critical period. 248 F. 2d 833. The court held that since this issue tendered genuine issues of fact it was triable as of right by a jury if a party demands one. In the words of the court (248 F. 2d at 835, 836):

> "Inherent in that issue is the resolution of disputed questions of fact involving decision as to the credibility of witnesses and *the need to weigh the evidence of National* to the effect that it was doing business in the Southern District of California, now that it is to its advantage to take such a position, *against its repeated allegations to the contrary in prior suits brought against it when it was to its advantage to take a stand diametrically opposed to what it is now attempting to prove.* And it should not be forgotten that decision must be made in the light of fact findings as to many matters peculiarly within the knowledge of those in charge of the affairs of National during the critical period; and as to many ocurrences which may seem to have chameleonic attributes when interpreted, or explained.
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> " • • • *its admissions that it did no business in California and had no agents there during the relevant period should, we think, make it perfectly clear that there were genuine issues of fact which could not properly be taken from the jury*: that it was erroneous to refer such issues to Judge Galston for trial without a jury." (Emphasis added.)

The respondent thereupon filed a petition for rehearing. The Court of Appeals granted rehearing and, in the instant case, vacated its previous judgment of reversal and entered a judgment of affirmance. *In so doing, however, the court did not reverse its prior determination that petitioner was entitled as of right to a jury trial insofar as the issue concerning the California statute of limitations was involved.* The court held, rather, that under the New York law the action was barred if the limitations period prescribed by either California or New York had expired and that the

evidence here clearly demonstrated that "the New York statute was not tolled by National's absence from New York or by its unpublicized activity in New York." 248 F. 2d at 842. And since the action was barred under the New York statute of limitations, petitioner's right to a jury trial as to the California statute became moot.

While the opinion on rehearing merely states that "National did have officers in the state", 248 F. 2d at 841, much more than that is implicit in the decision. For in concluding that the New York statute had not been tolled, the Court of Appeals necessarily made its own finding, unsupported by any finding of the District Court or by any ascertainable evidence, that "National did have officers in the state" *continuously* during the critical period. It further found that "the documentary evidence recited in Judge Galston's findings was overwhelming" and "irrefutable" to the effect that "National was amenable to process in New York during the relevant period." 248 F. 2d at 841-842. Indeed, on this latter point, the court stated that "if the facts had been heard by a jury, Judge Galston would have been required to set aside a plaintiff's verdict on this issue."

On December 6, 1957, the Court of Appeals denied petitioner's request for rehearing as to its judgment of affirmance and this petition for a writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

1. The decision below on rehearing, which is inconsistent with the original decision, raises an important question as to the right to a jury trial on contested issues of fact relative to a statute of limitations plea.

In its original decision dealing with this case, the Court of Appeals properly recognized that (248 F. 2d at 835-836):

> "Antitrust suits like these are triable as of right by jury if a party demands one. *Ring* v. *Spina*, 2 Cir., 166 F. 2d 546. And if National's affirmative defense based on the statute of limitations tendered genuine issues of fact, they were also as of right triable by jury. *Jelliffe* v. *Thaw*, 2 Cir., 67 F. 2d 880; *Chambliss* v. *Simmons*, 5 Cir., 165 F. 419. Applicable, to be sure, is the rule that when the evidence is so one-sided that reasonable men would not differ as to the facts proved, the judge may take the issue from the jury, but we do not regard the evidence in this record in that category * * *"

In other words, the petitioner having demanded a jury trial of all issues raised by the complaint and having moved specifically for a jury trial on the limitations plea, the petitioner became entitled *as of right* to a jury trial on the material and disputed questions of fact relative to the limitations defense.

That holding, of course, is in accord with the consistent rulings of this Court and of other federal courts that questions of material fact raised by the defense of the statute of limitations in an action at law are triable as of right by a jury, and not by a court alone. Such questions are "not questions of law for the court, but questions of fact, which should have been submitted to the jury." *Michigan Insurance Bank* v. *Eldred*, 130 U. S. 693, 699 (1889). See also *Jelliffe* v. *Thaw*, 67 F. 2d 880, 882 (C. A. 2, 1933); *Ingo* v. *Koch*, 127 F. 2d 667, 678-679 (C. A. 2, 1952); *Stornelli* v. *U. S. Gypsum Co.*, 134 F. 2d 461 (C. A. 2, 1943); *Arkansas*

Natural Gas Co. v. *Sartor*, 78 F. 2d 924, 929 (C. A. 5, 1935); *Don George, Inc.* v. *Paramount Pictures*, 111 F. Supp. 458, 471 (W. D., La., 1951).

Having applied this salutary principle so as to sustain petitioner's right to a jury trial as to the disputed facts relative to the California limitations issue, the Court of Appeals on rehearing violated the very rule it had just applied and denied petitioner the right to a jury trial as to the disputed facts involved in the New York limitations problem. It did so by applying to the trial court record a standard of review which went beyond the scope of proper appellate review and which reflected a basic hostility to the very concept of a jury trial on a limitations issue. It made unwarranted findings of its own. It gave to certain trial court findings an "overwhelming" and "irrefutable" nature which the trial court never intended, while at the same time ignoring the substantial conflicts in evidence which obviously underlay those findings. Never once did the Court of Appeals on rehearing address itself to the only relevant question on appeal—whether there were disputed issues of material fact as to the applicability of the New York statute of limitations which warranted trial by jury.

That there were such disputed issues as to the New York statute is at least as obvious, if not more so, as the existence of such disputed issues under the California statute. Under the New York statute of limitations in effect during the relevant period, at least two elements were necessary to toll the statute as to respondent: (1) one or more corporate officers had to be present continuously in the state throughout the six-year period,[4] and (2) the corporation had to be doing or transacting business continuously in New York during that period so as to make service in New York upon the officer then physically present in New York valid service on the corporation.[5] As to both elements,

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[4] *Chapin* v. *Posner*, 299 N. Y. 31 (1949); *Talmadge* v. *United States Shipping Board*, 54 F. 2d 240, 246 (C. A. 2, 1932).

[5] *Tauza* v. *Susquehanna Coal Co.*, 220 N. Y. 259 (1917); *Elish* v. *St. Louis Southwestern R. Co.*, 305 N. Y. 267 (1953).

there were obvious issues of fact which were properly resolvable by a jury. Yet the Court of Appeals deliberately chose to ignore the factual disputes on these points and the substantial evidence which petitioner had submitted to show that neither element had been satisfied.

The Court of Appeals was confronted with the fact that the District Court, by its own admission (140 F. Supp. at 916), found it unnecessary "to discuss the New York statute of limitations, and the allegations of the plaintiffs in respect to their contention that the defendant was not doing business in New York during the critical years." The District Court thus had no occasion to direct its findings or its conclusions to the New York situation. And for that reason the Court of Appeals had to fashion its own finding as to the first element under the New York statute. It did so without reference to any finding of the District Court and without reference to any evidence in the record. It simply stated, "National did have officers in the state." 248 F. 2d 841. Apart from the fact that such a finding is deficient for its failure to state that officers were present in the state continuously for six years, the court overlooked the substantial evidence as well as certain other findings of the District Court[6] expressly declaring that respondent's officers were frequently during each year of the relevant period absent from New York on extended trips to California. On this aspect of the New York statute alone, therefore, there were substantial issues of disputed facts warranting a jury trial.

As to the second element of the New York limitations statute, the requirement that the respondent has done or transacted business in that state continuously for six years, the Court of Appeals simply referred to and quoted ten of the findings of fact of the District Court and gave to them the descriptive title of "overwhelming" and "irrefutable". But the District Court admittedly made no pretense that

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[6] See District Court findings 13(b), 13(c), 13(f) and 28, printed in Appendix attached hereto, pp. 41a to 44a and 52a.

these findings were directed in any way to the second requirement of the New York statute, which the trial judge had found unnecessary to discuss. *These findings were at most concerned with the problem of venue in New York.* To convert such findings into the critical base for tolling the New York statute of limitations is an error of a most egregious sort.

Moreover, these ten findings were in no way based upon undisputed or irrefutable evidence; and the trial judge never so indicated. These findings were merely among those submitted by the respondent and adopted by the trial judge. They represented his view as to the preponderance of evidence, which at all times had been highly disputed. And in petitioner's judgment, these particular findings for the most part are wholly unsupported by the evidence, or constitute misstatements of the evidence, or are directly contradicted by the record. But the important consideration is that these findings grew out of disputed facts in the record, as the following tabulation shows:

Findings relied upon:	*Contradicting evidence in record:*
32. National's board meetings were held in New York from 1930 to June, 1936.	Respondent's Exhibit A-2 and its own stipulation conclusively establish that the last Board meeting in New York during the critical period was on April 9, 1936, and for 8 years thereafter no meetings were held in New York. Thus there was not a *continuous* period of 6 years in which tolling was avoided.
33. National's agent, Agency, maintained an office from June 1936 to the date when this action was begun at 444 West 56th Street, New York, N. Y., in space rented from	The facts show that Agency gave up its New York office in 1942, and moved to California, long before this action was begun in 1951. R. 233a. There was also docu-

Findings relied upon:	*Contradicting evidence in record:*
Twentieth Century-Fox. All officers of Agency had their offices there and met weekly in New York until Agency opened its office in California in August, 1942.	mentary evidence that at least prior to June 22, 1936, Agency's office was in New Jersey. Pet's Ex. 19; Res. Ex. A-2. Moreover, the uncontradicted testimony showed that during at least some of the period prior to 1942 Agency's officers had their offices in New Jersey. R. 62a-63a.
34. From the date of its organization to the date this suit was commenced, Agency performed substantial and continuous agency services for National and National's subsidiaries in New York. Agency kept National's books of account and performed in New York extensive supervisory, advisory, operating and managerial services for National and its subsidiaries. Agency maintained a payroll for National's employees.	Agency was organized on Sept. 28, 1935 (Res. Ex. A-2), but there was no evidence of any service performed for National prior to Dec. 2, 1935. Pet. Ex. 19. The services it did perform were not "continuous" services "in New York" and Agency did not keep "National's books of account" in New York. For at least a year and a half during the crucial period, these services were performed "in Jersey City". R. 68a. The testimony also showed that the services performed were neither "substantial" nor "extensive" but pertained "to inconsequential matters". R. 125a. There was no evidence that Agency maintained a payroll for National's employees. Indeed, after December 1935 National had no paid employees either in New York City or elsewhere. R. 147a-148a.

Findings relied upon:	*Contradicting evidence in record:*
37. National continuously maintained bank accounts in New York from 1930 throughout the period here involved. Its main account was with The Chase National Bank. It also had accounts in four other named banks.	There was no evidence whatever that any of the accounts with the five banks were maintained "continuously" during the relevant period since December 8, 1931. Some of the accounts were not even authorized until after July 20, 1938, the end of the relevant period. Res. Ex. A-2.
38. National borrowed money from time to time in New York from New York banks. Such loans were made in 1930, 1931 and 1932.	These were only isolated transactions, most of which occurred before the critical date of December 8, 1931.
39. In 1934 National in New York issued debentures to reflect its indebtedness to Fox Film Corporation. A New York bank was trustee under the trust indenture.	This was another isolated transaction, showing no continuity of activity in New York.
40. In 1935 a line of credit was established with a New York bank and loans from that bank were negotiated in 1935 and 1937.	These were sporadic activities, not showing that National was present or transacting business in New York in the statute of limitations sense.
41. From 1930 throughout the period here involved the dividends National received from its subsidiaries were received in New York, and National paid its dividends in New York. National had substantial assets.	There was no testimony or evidence in the record, documentary or otherwise, that National ever received or paid dividends in New York, or anywhere else, either before or after 1930. There was no evidence of "substantial assets" in New York. The only proof in this connection showed that National's stocks were kept in vaults in New Jersey during the relevant period. R. 101a.

Findings relied upon:	*Contradicting evidence in record:*
42. National paid no utility charges directly to any utility company, but paid a regular charge to its parent company for services such as utilities, office space and the like. From and after June 1936 payments for these facilities were made by Agency.	This finding was apparently based on certain "off the record" remarks by a witness who said he was "under the impression" National used to pay a certain amount each week to its parent company. R. 26a. Such statements, however, were inconsistent with the testimony of another of respondent's witnesses that National had no office and paid no rent at any New York address after 1930. R. 107a-108a.
43. National had no telephone listing prior to the summer of 1935. Thereafter its listing was cross-referenced to that of Agency. Prior to 1935 it had used the telephone facilities of Twentieth Century-Fox without a listing. Regular amounts were paid by National to Twentieth Century-Fox for the use of these facilities.	One of respondent's witnesses stated unequivocally with respect to the maintenance since 1930 of an office by National in New York that "they had no office there that I know of. They didn't pay any rent. * * * *They didn't maintain telephone facilities.* I think they didn't even have any stationery. * * * " R. 107a-108a.

Apart from the legal insufficiency of many of these findings to support a conclusion that National was continuously present and doing business in New York during the relevant period, the foregoing comparison demonstrates that the so-called "irrefutable" and "overwhelming" documentary evidence was in fact disputed and far from overwhelming. The ten findings relied upon by the Court of Appeals involved highly disputed factual matters as to which petitioner had a right to a jury determination.

An even more dramatic illustration of the disputed nature of the evidence relating to the application of the New York statute of limitations is afforded by the admissions in pleadings and testimony offered by respondent in prior judicial proceedings that it was not doing or transacting business in the State of New York. In its original opinion, the Court of Appeals relied heavily upon similar admissions by respondent as to its absence from California to demonstrate the existence of a jury case. The court there said that *admissions made in other proceedings that respondent "did no business in California and had no agents there during the relevant period should, we think, make it perfectly clear that there were genuine issues of fact which could not properly be taken from the jury: that it was erroneous to refer such issues to Judge Galston for trial without a jury."* 248 F. 2d at 836 (emphasis added).

By the same token, the sworn statements and admissions made by respondent that it did no business in New York "make it perfectly clear that there were genuine issues of fact which could not properly be taken from the jury." The refusal of the Court of Appeals to recognize that conclusion in its opinion on rehearing highlights the substantial error committed by that court—the error of denying to petitioner the right to a jury trial on contested issues of fact.

The right to a jury trial, which petitioner asserts here in the context of a civil anti-trust suit, is an important right. It partakes of the guaranty which the Seventh Amendment to the Constitution extends to trial by jury in law cases. Under the constitutional and traditional concept of this guaranty, a litigant is entitled to a jury resolution of all disputed issues of material fact. As this Court has said, "We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others." *Jones* v. *East Ten-*

nessee, V. & G. R. Co., 128 U. S. 443, 445 (1888). Or, as put in *Bailey* v. *Central Vermont R. Co.*, 319 U. S. 350, 353-354 (1943):

> "The jury is the tribunal under our legal system to decide * * * issues involving controverted evidence. To withdraw such a question from the jury is to usurp its functions."

The Court of Appeals has indeed usurped the functions of the jury in this case. It has fashioned its own finding, unsupported in any way, that respondent's officers were in fact continuously in New York for purposes of the limitations statute. It has adopted certain findings of the trial court, findings made without reference to the New York limitations statute, to support the highly contested conclusion that respondent was continuously doing business in New York for the relevant six years within the meaning of that statute. In so doing, the court has erroneously disregarded the contradictory nature of the evidence underlying these findings. And the court has discriminatorily refused to apply to the New York situation the measure of a genuine issue of fact which it applied to the California situation—the sworn statements of the respondent in prior judicial proceedings that it had no office and did no business in the respective state.

The issue here is not the soundness of the conclusion that the New York statute of limitations barred this action. Nor is the issue whether the facts warrant the opposite conclusion. The only relevant question is whether the facts were sufficiently controverted to require resolution by the fact-finding body, the jury. If so, the right to a jury trial was an absolute one which cannot be diluted in the manner indulged in by the court below.

Trial by jury is a fundamental guaranty of the rights of litigants. That guaranty applies to both individual and corporate litigants and it is in no way lessened in its im-

pact when considered in the context of a treble-damage suit under the federal anti-trust laws. The Seventh Amendment, with its guaranty of jury trial rights, contains no exception as to corporate litigants or anti-trust suits.

Thus review of the decision below is essential to maintain the jury trial guaranty in an effective form. And review is particularly appropriate and necessary here in a unique situation where the court below has in effect reached conflicting conclusions on the right to a jury trial on disputed limitations issues arising out of New York and California statutes. It is a conflict which only this Court can resolve.

2. The decision below on rehearing, in treating the activities of a subsidiary as those of the parent corporation for purposes of determining that the parent was transacting business in New York, conflicts with the applicable decisions of this Court and of Courts of Appeals in other circuits.

The court below, in its opinion on rehearing, relied in substantial part upon findings (Nos. 33, 34 and 42, quoted in footnote 3, 248 F. 2d at 841-842) to the effect that the activities of respondent's subsidiary, referred to as "Agency", were the activities of respondent. It did so for the purpose of demonstrating that respondent had done or transacted business in New York within the meaning of the New York statute of limitations. But such reliance was in disregard of the uncontradicted evidence that the respondent and Agency at all times maintained their separate corporate entities. R. 234a-235a. Respondent itself is on record as stating publicly and under oath that while it is the sole owner of the stock of Agency, the corporations are entirely separate, neither is an "instrumentality of the other" and neither engages in the business of the other. Pet. Ex. 18.

The consistent judicial attitude in such circumstances has been to recognize a bona fide corporate separation and to reject any contention that a parent is necessarily doing business within a particular state merely because of the activities of its wholly owned but separate subsidiary. In *Cannon Mfg. Co.* v. *Cudahy Packing Co.*, 267 U. S. 333, 336-337 (1925), this Court held that the activity of a wholly owned subsidiary in one state "does not necessarily subject the parent corporation to the jurisdiction" of that state, since the "corporate separation, though perhaps merely formal, was real" and "not pure fiction." The corporate veil is pierced in such a situation *only at the instance of third parties seeking to prevent fraud or injustice perpetrated upon them* by the maintenance of a fictional separateness between a parent and a subsidiary. See, *e.g.*, *Burnet* v. *Commonwealth Improvement Co.*, 287 U. S. 415 (1932); *Moline Properties* v. *Commissioner*, 319 U. S. 436 (1943).

The rule of the *Cannon* case has been followed in *Consolidated Textile Corp.* v. *Gregory*, 289 U. S. 85 (1933); *Gravely Motor Plow & Cultivation Co.* v. *H. V. Carter Co.*, 193 F. 2d 158 (C. A. 9, 1951); *Harris* v. *Deere and Co.*, 223 F. 2d 161 (C. A. 4, 1955). See also *Echeverry* v. *Kellogg Switchboard & Supply Co.*, 175 F. 2d 900 (C. A. 2, 1949). There being no asserted or proved reason for disregarding the admitted corporate separateness between respondent and Agency, the court below erred in treating the activities of Agency in New York as the activities of respondent. And that error involved a direct conflict with the decisions of this Court in the *Cannon* and *Consolidated Textile* cases, as well as with the cited decisions of other Courts of Appeals. Certiorari is therefore necessary and appropriate to correct the miscarriage of legal principle implicit in the decision below.

3. The decision below, by refusing to acknowledge and apply to the facts of this case the doctrine of preclusion against inconsistent judicial declarations by a litigant, is in conflict with applicable decisions of this Court and of Courts of Appeals in other circuits.

Petitioner introduced uncontradicted evidence in the trial below that in prior judicial proceedings officers and agents of the respondent stated under oath, in support of formal pleadings, that the respondent had in no way transacted or done business or had an office within the state of New York. The respondent in this manner consistently maintained that its only place of business was in New Jersey and that it was not subject to the jurisdiction of any federal or state court in New York. At least one court accepted these solemn declarations and held that respondent's place of business was indeed in New Jersey. *United States* v. *Paramount Pictures, Inc., et al.*, 70 F. Supp. 53, 58 (S. D. N. Y., 1947).

Despite petitioner's arguments below, the Court of Appeals declined to acknowledge the well-settled legal principle that the respondent was precluded by these prior court declarations from asserting a contrary position in the instant proceeding even as to strangers to the prior proceedings, to the effect that it had been doing business in New York during the relevant years. Had that principle been recognized and applied here, respondent's plea of the statute of limitations would have fallen as a matter of law.

The failure of the Court of Appeals to utilize this rule in light of the uncontradicted evidence is directly contrary to this Court's recognition of the soundness of this "wise and salutary doctrine which binds a party to his judicial declarations, and forbids him from subsequently contradicting his statements thus made." *Sturm* v. *Boker*, 150 U. S. 312, 334 (1893). In the words of this Court in *Sample* v. *Barnes*, 55 U. S. 70, 76 (1852), to permit respond-

ent "to contradict all that he has repeatedly and formally declared, would be to allow him to falsify his solemn acts, to trifle with the settled rules of law and the practice of the courts, and would lead to endless litigation."

More recently, this Court gave recognition to this principle in *Illinois* v. *Campbell*, 329 U. S. 362, 369 (1946), where reference was made to "the doctrine of estoppel or that part of it which precludes inconsistent positions in judicial proceedings." And in *Callanan Road Improvement Co.* v. *United States*, 345 U. S. 507, 513 (1953), this Court held that the appellant in that case "cannot blow hot and cold and take now a position contrary to that taken in the proceedings it invoked to obtain the Commission's approval." See also *Davis* v. *Wakelee*, 156 U. S. 691 (1895); *Missouri* v. *Chicago, B. & Q. R. R.*, 241 U. S. 533, 542-543 (1916); *Philadelphia, W. & B. R. Co.* v. *Howard*, 54 U. S. 512, 517-520 (1851).

The decision below conflicts not only with the decisions of this Court in the foregoing cases but also with the decisions of Courts of Appeals in other circuits. Thus in *Queenan* v. *Mays*, 90 F. 2d 525, 533, the Court of Appeals for the Tenth Circuit in 1937 adopted the language of this Court in *Davis* v. *Wakelee*, *supra*, that "where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." To the same effect, see *Chandler* v. *McKerral*, 68 F. 2d 343, 346 (C. A. 7, 1934); *Axelrod* v. *Osage Oil & Refining Co.*, 29 F. 2d 712, 729 (C. A. 8, 1928); *Livesay Industries, Inc.* v. *Livesay Window Co.*, 202 F. 2d 378, 382-383 (C. A. 5, 1953); *Texas Co.* v. *Gulf Refining Co.*, 26 F. 2d 394 (C. A. 5, 1928). As was said in *Davis* v. *Cornwall*, 68 F. 2d 522, 525 (C. A. 2, 1895), this Court in *Davis* v. *Wakelee*, *supra*, "did not consider the case upon the rules ap-

plicable to the common estoppel which springs from the misrepresentation of fact, but *put its conclusions upon the salutary doctrine of estoppel, which prohibits parties from playing fast and loose with the courts of justice.*" (Emphasis added.)

To resolve the clear conflict created by the decision below and to determine definitely the proper content and scope of the doctrine of preclusion in the situation presented by the instant case, the grant of certiorari is both appropriate and necessary.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

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APPENDIX TO PETITION

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 329, 330—October Term, 1956.

(Argued May 9, 1957 Decided September 10, 1957.)

Docket Nos. 24253, 24254

BERTHA BUILDING CORPORATION,
Plaintiff-Appellant,

—v.—

NATIONAL THEATRES CORPORATION,
Defendant-Appellee.

GUMBINER THEATRICAL ENTERPRISES, INC.,
Plaintiff-Appellant,

v.

NATIONAL THEATRES CORPORATION,
Defendant-Appellee.

Before:

HAND, CHASE and HINCKS,
Circuit Judges.

Appeals from two judgments of the United States District Court for the Eastern District of New York, Clarence G. Galston, *Judge,* dismissing the plaintiffs' complaints in actions of treble damages for violation of the Sherman

Act, § 1-33 of Title 15, U. S. Code, on an opinion reported at 140 F. Supp. 909. *Reversed and remanded.*

Boris Kostelanetz, New York, N. Y. (Corcoran, Kostelanetz & Gladstone, Arthur Karger, Theodore E. Gladstone, and Francis J. Mulderig, New York, N. Y., on the brief), *for appellants.*

Frederick W. R. Pride, New York, N. Y. (Dwight, Royall, Harris, Koegel & Caskey, Charles F. Young and Stanley Godofsky, New York, N. Y., on the brief), *for appellee.*

Hincks, *Circuit Judge*:

These are appeals by the plaintiffs from judgments of Judge Galston, dismissing the complaints in two actions to recover treble damages under the Sherman Act. The only question presented is whether the actions were barred by the Statute of Limitations. In that connection, the crucial question is this: Was it proper for the judge instead of a jury to decide whether the defendant could have been sued in the Southern District of California between July 20, 1935 and July 20, 1938? This is critical because upon it depends the question whether the actions were barred by the Statute of Limitations when they were commenced in the Eastern District of New York on September 5, 1951; and why this is true appears from the following facts.

The Sherman Act, even after its amendment by the Clayton Act in 1914, deals with the Statute of Limitations only in § 5 of the second Act, which provides that the period during which a suit in equity, brought by the United States, shall be pending shall toll the running of the statute as

to "every private right of action * * * based * * * on matter complained of in said suit." Concededly such a suit was pending from July 20, 1938, until September 5, 1951, when these actions were begun. Except for this the law of New York controlled, and § 48(2) of the Civil Practice Act of that state fixes six years as the period of limitation for an action "to recover upon a liability created by statute." Were this the only relevant section, the action of Gumbiner Co., in which the alleged damages were all suffered before Dec. 8, 1931, would have been barred in spite of § 5 of the Clayton Act, but the action of the Bertha Building Corporation in which the damages did not end before July 4, 1935, would not have been. However, § 13 of the New York Civil Practice Act provides that when a claim "arises outside this state an action cannot be brought in this state to enforce" it "after the expiration of the time limited" by the law of the state where the claim arose, and since the claims at bar arose in California, the law of that state controls: *i.e.*, § 351 of the California Code of Civil Procedure. This provides that, if the obligor of a liability is "out of the state" when it "accrues * * * the time of his absence is not part of the time limited for the commencement of the action." It is the defendant's position that it was not "out of the state" during the three years (the period of limitation in California), before July 20, 1938, because during all that time the plaintiffs could have sued it in the Southern District of California. If this was an issue properly tried to a judge, instead of to a jury, we all agree that Judge Galston's findings were not "clearly erroneous," so that at long last the outcome turns upon the answer to the crucial question posed in the opening paragraph of this opinion.

If the issue were one of whether the venue in each, or either, of the instant suits was proper, we should agree that no jury question was presented; for it is clear that a judge

may take that issue from a jury when it arises at a trial and decide it himself just as he might have done had it been raised before trial. But though decision as to whether these suits are barred by the statute depends upon whether National could have been sued by these plaintiffs in California before the California statute of limitations had run, and so comes down to a question of venue in respect to each of such supposititious suits, the critical issue in the instant actions remains whether the statute bars the suits. That issue is not to be treated as merely one of venue. A determination of this defense has a reach and a finality not inhering in any decision as to venue. For if the defense of the statutory bar is sustained, the resulting judgment of dismissal operates as a final adjudication of the merits of the controversy: a decision as to venue, however, of course leaves the plaintiff free thereafter to seek an adjudication on the merits of his claim. F. R. C. P. 41(b).

Inherent in that issue is the resolution of disputed questions of fact involving decision as to the credibility of witnesses and the need to weigh the evidence of National to the effect that it was doing business in the Southern District of California, now that it is to its advantage to take such a position, against its repeated allegations to the contrary in prior suits brought against it when it was to its advantage to take a stand diametrically opposed to what it is now attempting to prove. And it should not be forgotten that decision must be made in the light of fact findings as to many matters peculiarly within the knowledge of those in charge of the affairs of National during the critical period; and as to many occurrences which may seem to have chameleonic attributes when interpreted, or explained.

The burden is, of course, on National to establish its affirmative defense of the limitation statute. *Pieczonka v. Pullman Co.*, 2 Cir., 102 F. 2d 432. And when the plaintiff

has made out a prima facie case of absence from the jurisdiction the burden is on the defendant to show that such absence has not tolled the running of the statute. *Banister* v. *Solomon*, 2 Cir., 126 F. 2d 740.

Antitrust suits like these are triable as of right by jury if a party demands one. *Ring* v. *Spina*, 2 Cir., 166 F. 2d 546. And if National's affirmative defense based on the statute of limitations tendered genuine issues of fact, they were also as of right triable by jury. *Jelliffe* v. *Thaw*, 2 Cir., 67 F. 2d 880; *Chambliss* v. *Simmons*, 5 Cir., 165 Fed. 419. Applicable, to be sure, is the rule that when the evidence is so one-sided that reasonable men would not differ as to the facts proved, the judge may take the issue from the jury, but we do not regard the evidence in this record in that category even without the admissions of National. However that may be, its admissions that it did no business in California and had no agents there during the relevant period should, we think, make it perfectly clear that there were genuine issues of fact which could not properly be taken from the jury; that it was erroneous to refer such issues to Judge Galston for trial without a jury.

We would hold further that the dismissal below cannot be sustained as one properly ordered on the pleadings. This was an alternative ground on which the order appealed from was based.

Apparently Judge Galston thought that proof that National prior to 1938 was a member of a conspiracy which was injuring the plaintiffs within California (proof essential to a recovery) would necessarily mean that National was "transacting business" in California within the meaning of § 12 of the Clayton Act and hence was entitled to prevail in its defense of the statute of limitations. In other words, he apparently thought that a fact essential to the proof of the claim also proved a defense to the claim. That analysis has indeed a superficial plausibility.

Admittedly, it is hard to see how a finding that National was not transacting business in California (without such a finding the plaintiffs cannot escape the defense of the statute) can square with a finding that National was part of a conspiracy which caused injury to the plaintiffs in California (without which no recovery can be had on the complaint). However, the apparent conflict between those findings can perhaps be solved by ascertaining which of the numerous alleged co-conspirators are proven to be such, if any, and the relationship which exists between each of them and the defendant. Not until this is done, do the cases interpreting § 12 of the Clayton Act [15 U. S. C. A. § 22] become relevant. The most recent Supreme Court discussion of this problem occurs in dictum in *Bankers Life & Casualty Co.* v. *Holland*, 346 U. S. 379, where Justice Frankfurter dissenting on another point observes that co-conspirators "as such" are not "agents" for purposes of venue.

We cannot bring ourselves to accept the suggestion in *Giusti* v. *Pyrotechnic Industries*, 9 Cir., 156 F. 2d 351, that because of the presence within the jurisdiction of one co-conspirator all foreign corporations which are alleged to be co-conspirators are amenable to process. We think such doctrine inherently unsound and in conflict with the later pronouncement in *Bankers Life, supra*. The best discussion of the problem is in *Independent Productions Corporation* v. *Loew's Inc.* (S. D. N. Y. 1957), 148 F. Supp. 460. We agree fully with the rationale and holding of Judge McGohey's opinion in that case. Thus it is conceivable that the proofs may be such that a finding that National had no agents in California and acting independently had transacted no business there, and thus has not sustained its statutory defense, is not necessarily in conflict with a finding that it conspired with others to cause injury to the plaintiffs in California. The validity of a plaintiff's ver-

dict, if one shall be returned, cannot be assessed until all the evidence is in.

Reversed and remanded for a jury trial of the issue raised by the defendant's plea.

HAND, *Circuit Judge* (dissenting):

If these plaintiffs had sued the defendant within the period from July 20, 1935 and July 20, 1938, and the defendant had moved to dismiss the actions, as it did move on several other occasions, although the judge who heard the motion might have himself decided all issues of fact, he would have been free in his discretion to refer them to a jury, either upon a trial of that issue alone, or of the whole case. Rule 12(b) of the Federal Rules of Civil Procedure provides that among the defenses that a defendant may raise by motion is "improper venue," and Rule 43(c) provides that on any motion the court may hear the matter on affidavits, or "may direct that the matter be heard wholly or partly on oral testimony or depositions"; and there can be no doubt that this provision is constitutional. In a case depending upon the party's residence, the Supreme Court said: " * * * while the court might have submitted the question to the jury, it was not bound to do so, the parties having adduced their testimony, pro and con, it was the privilege of the court, if it saw fit, to dispose of the issue upon the testimony which was fully heard upon that subject." *Gilbert* v. *David*, 235 U. S. 561, 568. Earlier in *Wetmore* v. *Rymer*, 169 U. S. 115, 121, where jurisdiction depended upon the amount in controversy, it said: " * * * it would appear to have been the intention of Congress to leave the mode of raising and trying such issues to the discretion of the trial judge." See also *Lehigh Valley Coal Co.* v. *Washko*, 231 Fed. 42, 46 (C. C. A. 2). However, although the judge in an action during the critical period would have been

free to dispense with a jury, I do not see how we can say that he would have done so, and, since the defendant has the burden of proof on the issue of the statute of limitations, it failed to prove that the issue whether the defendant was "transacting business" in California would have been tried to a judge. I agree, therefore, with my brothers that Judge Rayfiel's order was wrong. Hence it follows that, if on the evidence before Judge Galston, a jury in an action brought in California might have found that the defendant had not "transacted business" in that state, the plaintiffs at bar were entitled to a verdict.

However, it seems to me that as on the evidence here at bar Judge Galston would have been bound to direct a verdict for the defendant if the case had been tried to a jury, Judge Ralfiel's error is immaterial. In short, I think that the defendant proved beyond dispute that it had been "transacting business" in California throughout the critical period. It will be necessary as a preliminary to deal with the plaintiffs' agreement that, regardless of whether the defendant had in fact been "transacting business," its denials that it had been in at least ten actions brought against it in both state and federal courts constituted a "judicial estoppel" against its present contradictory position. It is of course true that upon the trial in the actions at bar any statements made by the defendant in its pleadings and affidavits in other actions were competent evidence in favor of the plaintiffs; but I can find no warrant for the theory that they created a "judicial estoppel," except suggestions in one or two law reviews. Moreover, since such a doctrine is plainly contrary to the underlying basis of the whole doctrine of estoppel by judgment it is plainly without foundation. Judgment by estoppel is not designed as a moral sanction against inconsistency: it does not visit penalties upon those who take one position today and deny it tomorrow; it is designed only to prevent a

party who has, or has not, prevailed upon an issue in an earlier action to vex the same antagonist with the same dispute in a later one. The plaintiffs cite *Houghton* v. *Thomas*, 220 App. Div. 415, to the contrary, but Mack, the party against whom the estoppel there prevailed, although not a party to the earlier action, had been the attorney of one of the parties, which the court held to be the equivalent—itself a very doubtful extension of the doctrine.

The only issue therefore is whether the evidence before Judge Galston was in enough conflict to entitle the plaintiffs to a trial by jury. That makes it necessary to decide what § 12 of the Anti-Trust Act means by "transacting business." Section 7 had allowed an action to be brought in any district in which the "defendant resides or is found" and in the case of corporations this became "often an insuperable obstacle to" any remedy. *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U. S. 359, 374. The Supreme Court there held that in § 12 Congress added the clause, "transacts business," in order to assist the enforcement of the act by ridding actions of the web of refined decisions that had been woven about the word "found." It made no attempt, however, to state in general terms what constituted "transacting business" beyond saying (p. 373), that a corporation did so in any district "if in fact, in the ordinary and usual sense, it 'transacts business' therein of any substantial character." However, the Court discussed the issue at length in *United States* v. *Scophony Corporation*, 333 U. S. 795, 807, 808. In that case the defendant, a foreign corporation, had, as here, "transacted business" by means of a subsidiary corporation whose conduct it reserved the right to supervise and regulate. It is true that the issue was whether that made the defendant "found" within the district where it was sued, but since the Court held that it did, *a fortiori*, it was a ruling that the defendant had been "transacting business" there. Therefore, it

seems to me that we can, and indeed must, take what was said as an authoritative gloss upon § 12. The Court declared that the statute meant the "practical everyday business or commercial concept of doing or carrying on business 'of any substantial character' "; and that the amendment had substituted "practical business conceptions" in place of "the previous hair-splitting legal technicalities encrusted upon the 'found'—'present'—'carrying-on-business' sequence."

Judge Galston made very detailed findings that are too long and too many, to quote, but I append numbers 10, 11 and 12, because these succinctly state the facts that appear to me to be controlling. The plaintiffs object that these improperly imputed to the defendant such of the described activities as took place after the organization of a corporation, which the findings speak of as "Agency":—a wholly owned subsidiary whose officers were "in the main" the defendant's officers. I rely upon the following language in *United States* v. *Scophony Co., supra* (pp. 814, 815), which seems to me to make "Agency's" business "business transacted" by the defendant: "The contracts created controls in Scophony, and in the American interests as well, which taken in conjunction with the stock controls called for continuing exercise of supervision over and intervention in American Scophony's affairs. We need not decide whether, in view of the agreements' continuing and persuasive effects, they could be considered as sufficing in themselves to make Scophony 'found' within the New York district. Whether so or not, they set the pattern for a regular and continuing program of patent exploitation requiring, as we have said, Scophony's constant supervision and intervention."

I cannot see why this language does not apply almost literally, *mutatis mutandis*, to the contract of December 2, 1935, between the defendant and "Agency" along with

which the defendant assigned to "Agency" the contract of Skouras Brothers of June 13. Of course it is true that a jury might not have believed the testimony offered by the defendant as to what was done under these contracts, although they did not put in any evidence to contradict it. Moreover, there might be a difficulty, if there had been no evidence that "Agency" had ever acted under the contract. However, that the plaintiffs may not assert, for it would cut the ground from under the complaints, which are based upon acts of the defendant after the contracts had been made. Hence, if the jury disbelieved the testimony of the defendant's witnesses as to what they had done, they must assume that other persons committed the wrongs charged in the complaints, and yet that they did not do so in performance of the contract with "Agency," for that contract, if once in effect, set up a "program" of "constant supervision and intervention"; and made the defendant "transact business." Surely we are not warranted in treating seriously such a web of dialectical fantasy.

The only evidence that the plaintiffs produced was the defendant's repeated assertions that it did not do any business in California, and had no agents there. Although, as I have said, these were indeed admissible against it, they amounted to no more than statements of the legal result of whatever the defendant had done, and they raised no issue as to the authority vested in the Skouras Brothers by the contract of June 13, 1935, and in "Agency" thereafter. Any conduct in California in performance of those contracts *ipso facto* made the defendant "transact business" in that state, no matter how often the defendant chose to deny that that had been the legal effect of what was done. I need not therefore answer the argument that all parties to a conspiracy are not mutual agents in the sense that

what any one of them does is a "transaction of business" of all the rest.

In conclusion it seems to me worth while to observe that, although the result of my brothers' reasoning will indeed require the defendant to defend on the merits actions arising under the Anti-Trust Acts, toward which the Supreme Court, especially of late, has shown particular favor, it does so at the expense of a precedent of the greatest value to large corporations doing a wide interstate business. I cannot see why, if what we are deciding is right, a corporation by doing its local business through subsidiary corporations over whom it retains supervisory control, will not compel those whom it may damage to sue in some district where it can be "found," as distinct from any one in which it "transacts business." If so, the whole purpose of the amendments to § 12 will be defeated.

APPENDIX

"10. National Agency Corporation, a wholly-owned subsidiary of National, is a Delaware corporation which was organized in 1935. The name of this company was changed to National Theatres Amusement Co., Inc., and it was referred to at the trial by both names. It is referred to in these findings as 'Agency.' Agency was organized to render certain services and perform certain activities for National, which prior to the organization of Agency had been rendered and performed by National. Agency qualified to do business in New York in February, 1936, and in California in August, 1942. The same individuals were, in the main, the officers of National and of Agency. The two companies occupied the same premises.

11. Agency entered into a contract with National on December 2, 1935, under which Agency agreed to perform extensive services for National and its subsidiaries. Under that contract Agency agreed to keep National fully informed of all matters relating to the affairs and business of National and its subsidiaries, including, with respect to the operating subsidiaries, the daily results of theatre operations, profits and losses, cash position, nature of the properties owned and changes therein and the general corporate set-up of all such subsidiaries. Agency agreed to maintain National's books of account and furnish other accounting services such as preparation of statistical information, tax returns and similar matters. National agreed to pay Agency $3,000 per week for the services rendered to and for it. Throughout all of the period from the date of the contract in 1935 until the institution of these actions in 1951, Agency performed services for National and its subsidiaries as provided in that contract. Such services were performed in California and in New York and elsewhere.

12. The contract of June 13, 1935, between the Skouras brothers and National was assigned to Agency on December 2, 1933. The assignment provided that National, however, retained all its rights under its contract with the Managers. The assignment contained the following provision:

> 'It is understood that notwithstanding such assignment to you, we retain all our rights and privileges under said contract, including, without limitation, the right to terminate the same, and that by such assignment you receive only the rights to the services of the Managers above referred to and the right to enforce performance thereof in any way not inconsistent with our rights in such connection * * *.'

Under the employment contracts with the Skouras brothers, National paid their salaries until Agency was formed. After the organization of Agency, the fixed salaries were paid by that company pursuant to the assignment from National to Agency, but the portion of their compensation which was based upon the profits of National was paid by National. The payments made by Agency were made by it as the agent for National and for all purposes here were the same as though made directly by National."

2330

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 329-330—October Term, 1956.

(Petition filed Sept. 24, 1957 Decided November 7, 1957.)

Docket Nos. 24253-4

BERTHA BUILDING CORPORATION,
Plaintiff-Appellant,

—v. —

NATIONAL THEATRES CORPORATION,
Defendant-Appellee.

GUMBINER THEATRICAL ENTERPRISES, INC.,
Plaintiff-Appellant,

—v.—

NATIONAL THEATRES CORPORATION,
Defendant-Appellee.

Before:

HAND, CHASE and HINCKS,
Circuit Judges.

On Petition for Rehearing

DWIGHT, ROYALL, HARRIS, KOEGEL & CASKEY, New York, N. Y. (John F. Caskey, Frederick W. R. Pride, Charles F. Young, Stanley Godofsky, of counsel), *for petitioner National Theatres Corporation.*

CORCORAN, KOSTELANETZ & GLADSTONE, New York, N. Y. (Boris Kostelanetz, Arthur Karger, Theodore E. Gladstone, Francis J. Mulderig, of counsel), *for plaintiffs.*

PER CURIAM:

By its petition for rehearing the defendant, National, persuades us to amplify and modify our original opinion and decision.

We are unmoved by the petitioner's contention that we were wrong in asserting that a dismissal based upon a defense of the statute of limitations is an adjudication on the merits. *Warner* v. *Buffalo Drydock Co.*, 2 Cir., 67 F. 2d 540, which is cited in support of that contention, we think is distinguishable. And moreover, it has been superseded by the clear mandate of Rule 41(b) of the Federal Rules of Civil Procedure which in its last sentence directly contradicts the holding of the *Warner* case. Although under the rule in a proper situation the District Judge may specify that his order be without prejudice, Judge Galston did not so qualify his order of dismissal.

We think, however, that National is right when it now urges that we failed to consider the impact of the New York statute of limitations on the Gumbiner cause of action. The Bertha cause of action arose in 1935 which was within six years of the *Paramount* action. Thus as to Bertha the six-year New York statute, C. P. A. § 48(2), could not possibly have run and the crucial question was whether the

three-year California statute had run, as we correctly stated in the opening paragraph of our original opinion. However, in the *Gumbiner* case there was another question equally crucial, viz., whether the New York statute of limitations had run. For the Gumbiner cause of action accrued on December 8, 1931. Thus if the New York statute was not tolled by National's absence, the Gumbiner action was barred here in December, 1937. Section 13 of the New York Civil Practice Act * is alternative in operation: if the statute has run either in California *or* in New York the suit is barred here.

Gumbiner argues that the New York law should determine whether in fact the statute has been tolled. From this premise it asserts that under state law, although National may have been amenable to process in New York, the statute was nevertheless tolled during that period. This argument derives from an analogy to an individual debtor who has hidden out in an obscure part of the state under an assumed name. If a creditor can find him, such a debtor is amenable to process: but while he is thus hiding the statute of limitations is tolled. Gumbiner thus concludes that even if National was amenable to process in New York, its presence was not open and notorious and on that account the statute was tolled during the relevant period.

Even if New York law does determine tolling (a proposition we need not decide in this case), this argument is fallacious. For the tolling statute (C. P. A. § 19) ** during

* Section 13 in pertinent part reads as follows:

"Where a cause of action arises outside of this state, an action cannot be brought in a court of this state to enforce such cause of action after expiration of the time limited by the laws either of this state or of the state or country where the cause of action arose, for bringing an action upon the cause of action * * *."

** The main paragraph of § 19 in its present form reads:

"If when the cause of action accrues against a person, he is without the state, the action may be commenced, within the time

the relevant period had a subdivision (2), which declared "Nor does this section apply while a foreign corporation has had or shall have one or more officers in the state on whom a summons for such corporation may be served." On the record in this case that section was applicable: National did have officers in the state. Gumbiner would read in a further requirement of open and notorious conduct. But all of the New York cases cited in support of this proposition are concerned with individual defendants, most of whom have just entered the state or have just returned to it. Not one case applies an "open and notorious" requirement to a foreign corporation otherwise amenable to process throughout the statutory period. Indeed, in *Mack* v. *Mendels*, 249 N. Y. 356, 164 N. E. 248, Judge Lehman admonishes the courts construing C. P. A. § 19 to read it as the Legislature wrote it and not to imply further requirements.

Gumbiner further urges that National was not amenable to process in New York under either federal or state standards. We disagree. A careful review of the evidence before Judge Galston on the question of whether the New York statute was tolled has convinced us that, if the facts had been heard by a jury, Judge Galston would have been required to set aside a plaintiff's verdict on this issue. Even though the jury might have disbelieved every one of defendant's witnesses, the documentary evidence recited in Judge

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limited therefor, after his coming into or return to the state. If after a cause of action has accrued against a person, he departs from the state and remains continuously absent therefrom for the space of four months or more, or if, without the knowledge of the person entitled to maintain the action, he resides within the state under a false name, the time of his absence or of such residence within the state under such false name is not a part of the time limited for the commencement of the action."

Galston's findings was overwhelming.* Regardless of which standard is applied it is irrefutable that National was amenable to process in New York during the relevant period. *United States* v. *Scophony Corp.*, 333 U. S. 795; *Pomeroy* v. *Hocking Valley R. Co.*, 218 N. Y. 530, 113 N. E. 504; see also *Chaplin* v. *Selznick*, 293 N. Y. 529, 58 N. E. 2d 719.

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* The following findings of Judge Galston were based solely on a stipulation and on evidence corroborated by documentary evidence.

"32. National's Board of Directors held all of its meetings in New York and transacted its business there from 1930 to June, 1936. From June, 1936, to January, 1944, the Board met in Jersey City, New Jersey. After January, 1944, corporate meetings were again held in New York. All meetings of National's Executive Committee were held in New York during the existence of such Committee, i.e., from December 5, 1934, to January 3, 1936.

"33. National's agent, Agency, maintained an office from June, 1936, until the date these actions were begun at 444 West 56th Street, N. Y., in space rented from Twentieth Century-Fox. All officers Agency had their offices at that address from that time until Agency opened an office in Los Angeles in August, 1942. The Board of Directors of Agency met weekly in New York.

"34. From the date of its organization to the date of the institution of these actions, Agency performed substantial and continuous agency services for National and National's subsidiaries in New York. Agency maintained the payroll for its own and National's employees, kept National's books of account and performed in New York extensive supervisory, advisory, operating and managerial activities and services for National and its subsidiaries which it had agreed to perform under its contract of December 2, 1935, with National.

"37. National continuously maintained a bank account or accounts in New York from 1930 throughout the period here involved. Its main account was with The Chase National Bank of the City of New York and that bank was National's principal banker. National also had accounts with the Commercial National Bank and Trust Company, The Marine Midland Trust Company and the Guaranty Trust Company of New York.

"38. National borrowed money from time to time in New York from New York banks. In 1930 National borrowed a total of $9,350,000 from the Chase National Bank in three loans. In 1931 it borrowed $15,000,000 from The Chase National Bank. In 1932 National arranged for substantial loans for its California subsidiaries from The Chase National Bank and unconditionally guaranteed payment of these loans. National hypothecated its assets with

We now hold, therefore, that the Gumbiner action, since the New York Statute was not tolled by National's absence from New York or by its unpublicized activity in New York, is barred and that the District Court's dismissal of that action must be affirmed.

However, the majority of the court adheres to its holding that since the question of tolling in California presents substantial fact questions the *Bertha* case must be reversed and remanded for trial by jury on the limitations question.

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the bank in order to borrow money. As a result of those loans The Chase Bank was National's largest creditor until November, 1934, when it acquired 58 per cent of the stock of National in exchange for the indebtedness owed to it by National and National's subsidiaries.

"39. In October, 1934, National, in New York, issued debentures in the amount of $5,270,000 to Fox Film Corporation, dated as of March 4, 1933, to reflect National's indebtedness to Fox Film Corporation. The Empire Trust Company of New York was trustee under the trust indenture. Those debentures were exchanged for stock of National in the reorganization of November 14, 1934.

"40. In 1935 a line of credit in the amount of $750,000 was established with the Commercial National Bank & Trust Company of New York. Loans from that bank were negotiated in 1935 and 1937.

"41. From 1930 throughout the period here involved the dividends which National received from its subsidiaries were received by it in New York and the dividends paid by National were paid in New York. National had substantial assets.

"42. National itself paid no utility charges directly to any utility company. It paid a regular charge, however, to its parent Twentieth Century Fox Film Corporation for services such as utilities, office space and the like. From and after June, 1936, payments for these facilities were made by Agency.

"43. National itself did not have a telephone listing prior to the summer of 1935. Thereafter it was listed in the Manhattan telephone directory as "National Theatres Corporation, see National Theatres Agency Corporation." Prior to 1935 it had used the telephone facilities of Twentieth Century Fox without a listing and all calls came in through the Twentieth Centry Fox switchboard. Charges for the use of these telephone facilities were included in the regular amounts paid by National to Twentieth Century Fox."

In addition, several contracts are in the record which list 444 W. 56 St., New York City, as National's office address and the address to which notices may be sent. In a "Consent of Guarantor" defendant is stated to have an office and place of business in New York City.

Petition granted and our previous decision is modified to provide

As to the Gumbiner case, affirmed.

As to the Bertha case, reversed and remanded.

Judge HAND again votes to affirm both judgments for the reasons stated in his earlier opinion and without passing on the opinion now rendered in the Gumbiner appeal.

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UNITED STATES DISTRICT COURT

Eastern District of New York

Civil Action No. 12073—March 28, 1956

Bertha Building Corporation,

Plaintiff,

against

National Theatres Corporation,

Defendant.

Civil Action No. 12074

Gumbiner Theatrical Enterprises, Inc.,

Plaintiff,

against

National Theatres Corporation,

Defendant.

Appearances

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Of Counsel

GALSTON, *D. J.*

Pursuant to an order dated June 25, 1954 of Judge Rayfiel, a separate trial on the issue of the statute of limitations was conducted in two actions brought under the Clayton Act, 15 U. S. C. A., Section 1 et seq., against the defendant National Theatres Corporation. The actions were tried together. At the time of trial motions were made pursuant to Rule 12(c) of the Federal Rules of Civil Procedure for judgment on the pleadings.

The plaintiffs are California corporations, owning and operating theatres in the City of Los Angeles, California.

The complaints contain substantially identical allegations of conspiracy differing only in order of arrangement of the paragraphs and in the specific details of damage to the particular plaintiff.

It is important to note that in the very first paragraph of the complaint concerning jurisdiction it is alleged:

> "* * * the unlawful acts done in pursuance thereof, have been and were conceived, carried out, made effective and performed in part, within this District of the Court and elsewhere in New York and in Los Angeles, California, and throughout all parts of the United States."

Significant allegations are set forth as to the activities of operating subsidiaries of affiliates of the defendant in California. The defendant contends that the compelling inference must be that defendant, within the meaning of the Clayton Act, transacts business and is "found" within the State of California:

> "Wherever in this complaint it is alleged that any acts were done by any THEATRE OPERATING SUBSIDIARY of NATIONAL, plaintiff alleges that all of those acts were done at the behest and instigation of NATIONAL and were caused to be done by NATIONAL pursuant to the unlawful combination and conspiracy of which NATIONAL was a member, all as will be more completely set forth below.

"Unless otherwise specified, reference to NATIONAL in this complaint is intended to include NATIONAL and any theatre operating subsidiary or affiliate thereof as the context requires. * * *"

"NATIONAL has, at all times mentioned in this complaint and since prior to 1930, controlled certain theatre operating companies which at all times mentioned in this complaint and since prior to 1930 have owned, controlled, leased or operated upwards of five hundred (500) theatres in the states of California, Missouri, Washington, Arizona, Kansas, Illinois, Oregon, Colorado, Utah, New Mexico, Wyoming, Idaho, Montana, Nebraska, Michigan and Wisconsin."

The plaintiffs define their own terms:

"10. *Conspirators.* The term 'Conspirators' whenever used in this complaint is intended to include, but is not necessarily limited to each and any or all of the following: * * * and in addition to them, the defendant NATIONAL THEATRES CORPORATION, hereinafter referred to as NATIONAL and the other defendants herein.

"11. *Theatre Operating Subsidiaries of the Conspirators.* The term, 'Theatre Operating Subsidiaries of the Conspirators' is intended to include and designate those subsidiaries and affiliates of each or any or all of the CONSPIRATORS hereinbefore designated which own, control, lease or operate or have any interest in any motion picture theatre or theatres."

With respect to the conspiracy, each complaint alleges:

"Prior to January 1st, 1930, the defendant NATIONAL, and the other defendants herein and the MAJOR DISTRIBUTORS and certain producing and distributing corporations affiliated with or controlled by or controlling them, entered into an unlawful combination and conspiracy to restrain and to monopolize inter-

> state trade and commerce in motion picture films throughout and in all parts and places of the United States. The members of this unlawful combination and conspiracy have hereinbefore been identified and designated as the CONSPIRATORS."

Trade practices were put into effect in California pursuant to the alleged conspiracy which had as their object discrimination against so-called independent exhibitors, including the plaintiffs, to the advantage of the theatre-operating subsidiaries of the conspirators, including the theatre-operating subsidiaries of the defendant National in Los Angeles. Various means of effectuating the discrimination against the plaintiffs in Los Angeles are described, such as block booking, blind buying, uniform runs and clearances, fixing minimum admission prices and entering into joint theatre-operating agreements.

Overt acts of the conspirators in effectuating the conspiracy are charged:

> "In pursuance of said combination and conspiracy the said CONSPIRATORS, including as aforesaid the defendant herein NATIONAL, and affiliated corporations engaged in the practices and entered into the agreements and committed the acts herein alleged, all of which, unless otherwise stated, have been continuously and periodically done from the time of the formation of said conspiracy to July 20th, 1938, and subsequent thereto."

Certain practices are then described which are alleged to have been put into effect to favor the theatre-operating subsidiaries of National, and to discriminate against independent exhibitors, including plaintiffs in Los Angeles. For example:

> "During all times mentioned in this complaint and since prior to 1930, the CONSPIRATORS have excluded independent exhibitors, including the plaintiff, from the business of operating first and/or second run theatres and the business of exhibiting pictures on the first and/or second run in the City of Los Angeles

and in other cities of the United States with a population of over 100,000."

In Count Two of each complaint, it is alleged that there was a monopoly and conspiracy to monopolize the exhibition of motion pictures by National and its subsidiaries in certain areas, including specifically the State of California and particularly the City of Los Angeles. Means to effect the alleged monopoly are set forth:

> "2. NATIONAL and NATIONAL'S wholly owned subsidiary, Fox West Coast Theatres, Inc., a California corporation, with principal offices in Los Angeles, California, secured control of approximately Two Hundred and Sixty (260) theatres in the said states of California, Arizona, Nevada and New Mexico, which were organized and grouped into a circuit known as Fox West Coast Theatres, Inc.
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> "4. NATIONAL coerced, induced or persuaded or forced the operators of theatres in said states, including the plaintiff, to cease operating their theatres either so that NATIONAL or its THEATRE OPERATING SUBSIDIARIES could acquire such theatres or have removed the competition which such theatres in the hands of independent operators offered."

It is conceded that the Bertha cause of action accrued July 4, 1935, the Gumbiner December 8, 1931. It is from those dates that computations must be made as to the running of the statute of limitations.

Both actions were commenced in 1951, which is prior to the effective date of the four year federal statute of limitations (Section 4B of the Clayton Act, 69 Stat. 283, 15 U. S. C. A., Section 15B), and therefore the applicable statute of limitations is determined by reference to the law of the state in which the action is pending. *Chattanooga Foundry* v. *Atlanta*, 203 U. S. 390 (1906); *Hoskins Coal*

& Dry Dock Corp. v. *Truax Traer Coal Co.*, 191 Fed. 2d 912 (7th Cir. 1951), cert. den'd 342 U. S. 947 (1952); *Schiffman Bros* v. *Texas Co.*, 196 Fed. 2d 695 (7th Cir. 1952).

A federal court in applying the state statute of limitations applies the entire statute, including the statutory borrowing provisions relating to causes of action accruing in foreign jurisdictions. *Winkler-Koch Engineering Co.* v. *Universal Products Co.*, 79 Fed. Supp. 1013 (S. D. N. Y. 1947); *Hansen Packing Co.* v. *Swift & Co.*, 27 Fed. Supp. 364 (E. D. N. Y. 1939); *Seaboard Terminals Corporation* v. *Standard Oil Co.*, 24 Fed. Supp. 1018, aff'd 104 Fed. 2d 659 (2d Cir. 1939).

The New York statute, Article II of the Civil Practice Act (2d Ed. Cahill-Parsons 1955) contains a borrowing clause in Section 13:

> "Where a cause of action arises outside of this state, an action cannot be brought in a court of this state to enforce such cause of action after the expiration of the time limited by the laws of either this state or of the state or county where the cause of action arose, for bringing an action upon the cause of action, except that where the cause of action originally accrued in favor of a resident of this state, the time limited by the laws of this state shall apply * * *"

Thus, under Section 13, if a cause of action is barred in the state where it arose, it will also be barred in New York against a non-resident, regardless of whether the period of time allowed by the New York statute of limitations has or has not run. *Isenberg* v. *Ranier*, 145 App. Div. 256 (1st Dept. 1911); *Kirsch* v. *Lubin*, 131 Misc. 700 (Sp. Ct., N. Y. Co. 1927), aff'd 223 App. Div. 826 (1st Dept. 1928), aff'd 248 N. Y. 645 (1928); see Report of New York Law Revision Commission, N. Y. Legis. Doc. 1943, No. 65, pages 142, 164.

The applicable California statute of limitations is three years. California Code of Civil Procedure, Section 338-1.

In consequence, the causes of action alleged in the Bertha case were barred as of July 4, 1938, and the Gumbiner Theatrical case as of December 8, 1934, unless the statute was tolled. If it is established that the California statute was not tolled, then nothing more need be considered, since both limiting dates are prior to the institution of *United States* v. *Paramount et al.* (S. D. N. Y. Eq. No. 87-273). This action the plaintiffs claim tolled all statutes of limitation.

Basically though, the plaintiffs allege that the California Statute of Limitations was tolled by Section 351 of the California Code of Civil Procedure:

> "Sec. 351. EXCEPTION, WHERE DEFENDANT IS OUT OF THE STATE. If, when the cause of action accrues against a person, he is out of the state, the action may be commenced within the term herein limited, after his return to the state and if, after the cause of action accrues, he departs from the state, the time of his absence is not part of the time limited for the commencement of the action."

Accordingly the California courts have construed that section in accordance with its stated purpose: to prevent the running of the statute of limitations against a plaintiff who was unable to present his cause of action in California because the defendant was not amenable to the process of the California courts. See *Chappell* v. *Thompson*, 21 Cal. App. 136, 131 Pac. 82 (D. C. App. 2d Dist. 1913); and *Schneider* v. *Schneider*, 82 Cal. App. (2d 860, 187 P. 2d 459 (D. C. App. 2d Dist. 1947).

Therefore, the question presented is whether the defendant National Theatres was amenable to suit in California under the Anti-Trust Act. This question is in part solved by the Clayton Act, Section 12, 15 U. S. C. 22, which reads as follows:

> "Any suit, action, or proceeding under the anti-trust laws against a corporation may be brought not only

> in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant or wherever it may be found."

Thus to determine venue it must be decided whether within the meaning of Section 22 of the Act, National Theatres was an inhabitant of California, could have been found there, or transacted business there. The term "transacted business" in Section 22 has a particular meaning which is independent of other definitions of the term in state and federal courts. See *United States* v. *Scophony Corporation*, 333 U. S. 795 (1948).

California authorities support the position taken by the defendant. In *Steiner* v. *Twentieth Century-Fox Film Corporation et al.*, (Unreported, No. 12944-P. m. Civil, S. D. of California, Central Division, July 22, 1953) it was held that if

> "National Theatres engaged in the acts constituting the alleged conspiracy since 1935, all of which are alleged to have occurred in the State of California, then it was certainly doing business in the State of California sufficient to make it responsive to process of the courts of California, and this is true whether it was done directly by National Theatres Corporation or acting through its agents, the other members of the alleged conspiracy. Squarely in point is the Ninth Circuit case of Giusti v. Pyrotechnic Industries, 156 Fed. 2d 351, cert. denied 329 U. S. 787." *

In *E. B. DeGolia* v. *Twentieth Century-Fox Film Corporation et al.* (Unreported, Civil Action No. 32,514, September 9, 1953 and April 12, 1954, D. C. N. D. of Calif., Southern Division) the court reaffirmed the principle enunciated in the *Giusti* case (cited in the *Steiner* case *supra*) that

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* Reversed and remanded on other grounds (9th Cir.) March 15, 1956.

venue is proper as to all conspirators in the district in which the impact of the conspiracy caused the damage to the plaintiff. See also *Taylor* v. *Navigazione Libera Triestina*, 95 Fed. 2d 907.

Authorities in other states have held to the same effect. In *Ross-Bart Theatres* v. *Eagle Lion Films, Inc.* (unreported, Civil Action No. 1576, Eastern District of Virginia, Norfolk Division, February 17, 1954) the plaintiff there moved to quash process in an anti-trust action and for dismissal of the action for improper venue. In denying the motion the court said:

> "The motion must be denied. Section 12 of the Clayton Act, 15 U. S. C. A. 22, said the Court in United States v. Scophony Corp. (1947) 333 U. S. 795, 808, intended that a 'foreign corporation no longer could come to a district, perpetrate there the injuries outlawed, and then by retreating * * * to its headquarters defeat or delay the retribution due'. This conclusion was also the clear implication of Eastman Co. v. Southern Photo Co. (1925) 273 U. S. 359, 373. The result is that if the defendant was by itself or through others participating in any business combination or conspiracy in this district in 1948 in such a manner as to violate the anti-trust acts, it was suable here in 1953 no matter its then location. Further, for this purpose it could be reached with process running out of this Court wherever it was an inhabitant or was to be found. * * * the Court holds that the sworn charges of the combination and conspiracy in this district, and the commission of acts in the district pursuant thereto directly or by coconspirators admittedly present here sustain venue in the eastern district of Virginia."

To the same effect is *Don George Inc.* v. *Paramount Pictures*, 111 Fed. Supp. 458 (W. D. La., 1951). In that case the court relied on the interpretation given Section 12 of the Clayton Act in *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U. S. 359 (1927). See also *Hansen Packing Co.* v. *Swift & Co.*, 27 Fed. Supp. 364.

In *United States* v. *National City Lines*, 334 U. S. 573 (1947) the court said, in discussing the changes enlarging the venue provisions under the original Sherman Act and the Clayton Act:

> "The basic aim of the advocates of change was to give the plaintiff the right to bring suit and have it tried in the district where the defendant had committed violations of the Act and inflicted the forbidden injuries." (p. 583)

So on the basis of the allegations in the complaints, under Section 12 of the Clayton Act, 15 U. S. C. 22, the court sitting in California could have had jurisdiction over the defendant.

In these circumstances the decisions of the California courts compel the conclusion that Section 351 of the California Code is not applicable in the cases at bar, and the statute of limitations was therefore not tolled. The actions were therefore barred as of July 4, 1938 in the Bertha case, and as of December 8, 1934 in the Gumbiner case.

Defendant's motion for judgment on the pleadings under Rule 12c of the Federal Rules of Civil Procedure is granted and the complaints are dismissed.

Before proceeding to an alternative method of reaching the same result on the facts as adduced at the trial, the objections made by plaintiff to the inconsistent positions that have been taken by defendant in reference to doing business or transacting business in California may be considered. Plaintiffs urge that since defendant has previously taken the position, in other actions, that it was not doing business in California, defendant should now be precluded or estopped from changing its position.

Under the present rules of Federal Practice, inconsistent defenses are specifically permitted, Rule 8e (2). If this is allowed in the same action, it is difficult to sustain the position that defendant should not be allowed to plead in separate and distinct actions either one or both defenses.

Moreover the plaintiffs have not shown that in any of the actions in which such inconsistent plea was made it was sustained. In fact, evidence at the trial was to the effect that National, in each instance where the plaintiff did not seek dismissal, appeared and defended the action on the merits. This being so, the cases cited by plaintiffs are not in point. See *Philadelphia, W & B R. R.* v. *Howard*, 13 How. 307 (1851); *State Compensation Ins. Fund* v. *Proctor & Schwartz, Inc.*, 102 Fed. Supp. 451 (E. D. Pa. 1952); *Queenan* v. *Mays*, 90 Fed. 2d 525 (10th Cir. 1937), cert. den'd 302 U. S. 724; *Chandler Laboratories* v. *Smith*, 88 Fed. Supp. 583 (E. D. Pa. 1950).

Plaintiffs also rely on a note in 59 H. L. R. 1132 (1946), but at page 1136 the following point is established:

> "* * * the courts do not usually preclude a party who has been inconsistent as to the law rather than as to facts. This result is probably reached on the reasoning that, historically, switching one's legal grounds in a suit has never been regarded with the same disfavor as maintaining inconsistent positions as to the facts. Clark-Code Pleading 1928 (p. 434)."

It cannot be too strongly emphasized that the facts are determinative of the issue whether the defendant was doing business or "found" during the times in question. Certainly there is no statutory act which precludes or estops the defendant from maintaining its present position. Nor indeed has the plaintiff been able to show that an equitable estoppel should be charged against the defendant. It may be observed in this connection that there is no showing by the plaintiffs that the plaintiff was prejudiced by the legal defenses which the defendant may have raised in other actions to which the plaintiffs were not parties. I repeat: the facts themselves are determinative of the issue.

The *Scophony* case (*supra*) makes it clear that "transacting business" must be interpreted in the light of the

nature of the activities of the corporation, and that a list of minor matters incident to doing business is not conclusive. Among such items which the court listed as not being valid criteria were: Maintaining an office, warehouse or place of business, owning realty or other physical property; keeping a staff of employees; keeping a telephone or listing, etc.

It was upon the absence of similar incidents of transacting business that plaintiffs here have heavily relied: lack of ownership of real estate, as lessee or tenant; nonpayment of local taxes; not maintaining a staff of employees: location of record books, and not maintaining an office.

However, on the overall consideration of all the facts, including those relating to the nature of National Theatres Corporation as a holding company which took an active part in the affairs of its subsidiaries, it must be concluded that National transacted business in California during the period in question, and no less certainly could thus be "found" in California.

National was parent and grandparent in an intricate multi-corporate structure, and through that structure engaged in the business of exhibiting motion pictures. Approximately two hundred theatres were located in California. Charles P. Skouras and Spyros Skouras were general managers of National pursuant to contracts dated January 19, 1932 and June 13, 1935, and were present in California transacting business of the corporate structure and of direct interest to National. Charles Skouras actually established his office and resided in Los Angeles. National Theatres guaranteed performance by its subsidiary, National Agency Corporation, of the employment contract of J. J. Sullivan which was to be performed in California. John B. Bertero performed many specific services for National in California. National participated in the bankruptcy proceedings of its largest subsidiary, Fox West Coast Theatres, from February 1933 to February 1935 in the United States District Court for the Southern District

of California; and National purchased, in California, the assets of the bankrupt estate at the trustee's sale in Los Angeles.

So as alternative grounds for dismissing the complaint as barred by the California statute of limitations, I find as a matter of fact that within the interpretation given Section 12 of the Clayton Act, 15 U. S. C. 22, in *United States* v. *Scophony Corp.*, 333 U. S. 795 (1947), and *Eastman Kodak* v. *Southern Photo Materials Company*, 273 U. S. 359 (1927), National Theatres was transacting business in California.

In the light of the foregoing analysis it is not necessary to this decision to pass upon the effect of the institution of the action of the *United States* v. *Paramount* on July 20, 1938. By that time the claims of both plaintiffs herein were barred by the statute of limitations in California. By no stretch of the imagination in such circumstances can it be held that the institution of the anti-trust suit filed by the United States against Paramount and other defendants, including National, can revive the dead issue, despite the provisions of 15 U. S. C. A., Section 16, which reads:

"• • •

> "Whenever any suit or proceeding in equity or criminal prosecution is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, the running of the statute of limitations in respect of each and every private right of action arising under said laws and based in whole or in part on any matter complained of in said suit or proceeding shall be suspended during the pendency thereof."

Nor is it necessary, therefore, to discuss the New York statute of limitations, and the allegations of the plaintiffs in respect to their contention that the defendant was not doing business in New York during the critical years. It is sufficient for that purpose to refer to the findings which will be filed concurrently with this opinion. They are necessarily multiple because of the voluminous record.

It has been said truly that a statute of limitations is a statute of repose. See *Wood* v. *Carpenter*, 101 U. S. 135, in which it was said:

> "Statutes of limitation are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs. An important public policy lies at their foundation. They stimulate to activity and punish negligence. While time is constantly destroying the evidence of rights, they supply its place by a presumption which renders proof unnecessary. Mere delay, extending to the limit prescribed, is itself a conclusive bar. The bane and antidote go together."

Defendant was amenable to suits in both California and New York, and they should be precluded from maintaining actions sixteen and twenty years respectively after the alleged causes of action accrued. The complaints are dismissed.

Settle orders.

/s/ Clarence G. Galston
U. S. D. J.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Civil Action No. 12073

March 28, 1956

BERTHA BUILDING CORPORATION,

Plaintiff,

against

NATIONAL THEATRES CORPORATION,

Defendant.

Civil Action No. 12074

GUMBINER THEATRICAL ENTERPRISES, INC.,

Plaintiff,

against

NATIONAL THEATRES CORPORATION,

Defendant.

In conformity with my opinion in these cases, I make the following findings of fact and conclusions of law:

Findings of Fact

1. The plaintiff in each action is a corporation organized and existing under the laws of the State of California.

2. The cause of action alleged by Gumbiner Theatrical Enterprises, Inc. against the defendant accrued on December 8, 1931, in California.

3. The cause of action alleged by Bertha Building Corporation accrued no later than July 4, 1935, in California.

4. Defendant National Theatres Corporation (hereinafter referred to as "National") is a Delaware corpora-

tion, incorporated under the name of Wesco Corporation prior to 1930. During all of the periods of time here involved it was engaged in the business of exhibiting motion pictures through theatres which were owned or leased and operated by its direct and indirect wholly owned subsidnaries. During all of such periods certain of such wholly-owned subsidiaries operated approximately two hundred theatres in the State of California. National was a wholly-owned subsidiary of Twentieth Century Fox Film Corporation (then known as Fox Film Corporation) from prior to 1930 until November 14, 1934. On this latter date National was reorganized in New York and The Chase National Bank of the City of New York acquired 58 per cent of the stock of the company. In 1943, Twentieth Century-Fox reacquired the bank's interest and National again became a wholly owned subsidiary of Twentieth Century-Fox.

5. On January 19, 1932, National entered into a written contract employing Spyros P. Skouras, Charles P. Skouras and George P. Skouras as general managers of its entire business and the business of its subsidiaries. Among other things, the contract provided:

> "(3) So far as permitted by law, the Managers shall have full authority to direct, manage and operate all of the business and affairs of Wesco • • • and, in so far as Wesco during the term of this agreement controls the business and affairs of its subsidiary companies, to direct, manage and operate the business and affairs of such subsidiary companies."

Pursuant to this agreement two of the Skouras brothers, Spyros and Charles, entered upon their employment by National at or about the date of said agreement and, in fact, acted as the managers of the entire business of National throughout the country.

6. Pursuant to the agreement of January 19. 1932, Spyros P. Skouras was elected president and a director of

National which position he held until November, 1934, when Sidney R. Kent, president of Twentieth Century-Fox, was elected president of National. Spyros P. Skouras was elected executive vice-president at that time. His duties and the services performed by him, however, remained the same. Spyros P. Skouras continued as executive vice-president and one of the general managers of National until April, 1942, when he succeeded Mr. Kent as president of Twentieth Century-Fox. Thereafter he became Chairman of the Board of National.

7. Pursuant to the contract of January 19, 1932, Charles P. Skouras in about March, 1932, established his office as co-general manager of National at 1609 West Washington Boulevard, Los Angeles, California, such address being that of a building maintained by Fox West Coast Theatres, a wholly-owned subsidiary of National. Mr. Skouras also established his residence in Los Angeles. At or about that time he became an officer and director of all of National's West Coast subsidiaries, and continued as such during all of the periods here involved. In April, 1942, he was elected president and employed as general manager of National. He maintained his office and residence in Los Angeles continuously from March, 1932, until his death in 1954. The office maintained by him in Los Angeles was, in effect, the western office of National.

8. The two Skouras brothers, as general managers of National, were equal in the scope and extent of their authority. From in or about March, 1932, they were in day-to-day communication. Though Charles P. Skouras maintained his office and residence in California, his activities were not confined to the operation of National's affairs in that state; along with his brother and co-general manager, he was active in all phases of National's business throughout the country. He was also an officer and director of many of National's subsidiaries which operated in states other than California.

9. The contract of January 19, 1932, between National and the Skouras brothers was terminated on November 3, 1934. Negotiations for a new contract were then entered into which resulted in an employment contract dated June 13, 1935, whereby National again employed Spyros P. Skouras and Charles P. Skouras as general managers of its entire business for a period ending December 31, 1944. There was no interruption of the managerial and executive duties of the managers between November 3, 1934 and June 13, 1935, or of the services performed by them. Though the contract provided that National's rights to the services of the managers could be assigned to any service or operating subsidiary of National, the contract also provided that:

> "Notwithstanding any such assignment, the Corporation shall remain unconditionally liable as principal obligor for all obligations to be performed by it hereunder to the extent the same are not fully and finally performed by any such assignee, and the Corporation and the Managers shall retain all their rights hereunder, including without limitation any right to terminate this Agreement or enforce any of the provisions thereof for their own benefit, to the same extent as though no such assignment had taken place."

10. National Agency Corporation, a wholly-owned subsidiary of National, is a Delaware corporation which was organized in 1935. The name of this company was changed to National Theatres Amusement Co., Inc., and it was referred to at the trial by both names. It is referred to in these findings as "Agency". Agency was organized to render certain services and perform certain activities for National, which prior to the organization of Agency had been rendered and performed by National. Agency qualified to do business in New York in February, 1936, and in California in August, 1942. The same individuals were, in the main, the officers of National and of Agency. The two companies occupied the same premises.

11. Agency entered into a contract with National on December 2, 1935, under which Agency agreed to perform extensive services for National and its subsidiaries. Under that contract Agency agreed to keep National fully informed of all matters relating to the affairs and business of National and its subsidiaries, including, with respect to the operating subsidiaries, the daily results of theatre operations, profits and losses, cash position, nature of the properties owned and changes therein and the general corporate set-up of all such subsidiaries. Agency agreed to maintain National's books of account and furnish other accounting services such as preparation of statistical information, tax returns and similar matters. National agreed to pay Agency $3,000 per week for the services rendered to and for it. Throughout all of the period from the date of the contract in 1935 until the institution of these actions in 1951, Agency performed services for National and its subsidiaries as provided in that contract. Such services were performed in California and in New York and elsewhere.

12. The contract of June 13, 1935, between the Skouras brothers and National was assigned to Agency on December 2, 1935. The assignment provided that National, however, retained all its rights under its contract with the Managers. The assignment contained the following provision:

> "It is understood that notwithstanding such assignment to you, we retain all our rights and privileges under said contract, including, without limitation, the right to terminate the same, and that by such assignment you receive only the rights to the services of the Managers above referred to and the right to enforce performance thereof in any way not inconsistent with our rights in such connection * * *."

Under the employment contracts with the Skouras brothers, National paid their salaries until Agency was

formed. After the organization of Agency, the fixed salaries were paid by that company pursuant to the assignment from National to Agency, but the portion of their compensation which was based upon the profits of National was paid by National. The payments made by Agency were made by it as the agent for National and for all purposes here were the same as though made directly by National.

13. Throughout the pertinent periods here involved National's business activities in California were substantial and continuous. Among such activities were the following:

(a) Charles P. Skouras continuously resided and maintained his office in California from 1932 until his death in 1954. From his office in California he carried out his duties and functions as one of the co-general managers of National until April, 1942, and thereafter as president and general manager. Charles P. Skouras was active in all phases of National's business activities throughout the country and carried out his functions as a manager of National's business as a matter of routine in his day to day activities. The performance of his duties and functions as an officer and director of National's subsidiaries in California were pursuant to and required by his contracts as a general manager of National. Such activities were performed mainly in California. Charles P. Skouras was an agent of National within the meaning of Section 4 of the Clayton Act.

(b) Spyros P. Skouras, the other co-general manager of National as well as president until November, 1934, and executive vice president until April, 1942, made frequent and extended business trips to California, from six to eight each year, from 1932 to 1942 to supervise, manage, and carry on National's business in the Far West and particularly in California in conjunction with his brother and

co-general manager Charles P. Skouras. When not in California, Spyros P. Skouras was in almost daily communication with Charles P. Skouras with respect to the affairs of National, not only in California but throughout the country.

(c) When in California, Spyros P. Skouras consulted and advised not only with Charles P. Skouras but with others who carried on National's business there. He visited and inspected theatre properties; carried on negotiations for the licensing of motion pictures; and held conferences with personnel employed directly by subsidiaries but who assisted in carrying on the business of National in California. He was accompanied from time to time by other officers of the company who also performed services for National in California. Film buyers usually accompanied Spyros P. Skouras on his trips to California and performed film buying activities there.

(d) J. J. Sullivan was the chief film buyer for National's West Coast subsidiaries. His film buying activities were under the supervision of Spyros P. Skouras. His activities in this respect were for theatres operated by subsidiaries of National in California and elsewhere. Mr. Sullivan at all times was a resident of California and maintained his office at 1609 W. Washington Boulevard in Los Angeles, but spent from four to six months each year in New York in the performance of his work. He signed an employment contract with Agency on December 5, 1935, and National guaranteed performance of the contract. Mr. Sullivan had refused to enter into the contract unless National guaranteed payment. The contract provided that notices should be sent to Mr. Sullivan at 1609 West Washington Boulevard, Los Angeles, California. The contract provided that expenses incurred by Mr. Sullivan outside of Los Angeles were to be reimbursed by Agency. If performance of the contract required Mr. Sullivan to spend more than six months of the year outside of Los Angeles, he had the right to terminate.

(e) John B. Bertero, a member of the California Bar, was employed by one of National's subsidiaries in October, 1930, and has continuously been employed in Los Angeles by one of such subsidiaries since that time. Continuously during all periods here involved he has resided in Los Angeles and has maintained his office at 1609 West Washington Boulevard in that city. Mr. Bertero and other attorneys directly employed by National's subsidiaries performed continuous services for National as a matter of routine, as well as when called upon to do so by one of the managers or officers of the company. Part of his function was to cooperate or work with Charles P. Skouras, National's manager. He continuously advised with Mr. Skouras in Los Angeles concerning various problems of National. Among the specific services performed by Mr. Bertero were work for National in Los Angeles in connection with bank loans made to National and its subsidiaries by The Chase National Bank in 1932; work with National's representatives in connection with the bankruptcy of Fox West Coast Theatres and of Pacific Northwest Theatres in 1933-1935; inspection of theatre properties in Montana and Wyoming when National considered realigning its theatre operating divisions about 1937; appearance for Fox West Coast Theatres Corporation and work with National's attorneys in the case of *Tally & Corbar* v. *Fox Film Corporation et al.* in the United States District Court in Los Angeles in 1935-1936; selecting and advising with attorneys who represented National in litigation in California; and, throughout the entire period, the day to day activities incident to his employment which involved or related directly to the business of National.

(f) National appeared and actively participated in the bankruptcy proceedings of its largest subsidiary, Fox West Coast Theatres, from February, 1933, to February, 1935, in the United States District Court for the Southern District of California in Los Angeles. National was one of the largest

creditors of the bankrupt, and because of the size and importance of its claims had a crew of men and representatives on the ground in California. Spyros P. Skouras and H. C. Cox, officers of National, were active in the proceedings in California. National purchased the assets of the bankrupt at the trustees' sale in Los Angeles on February 2, 1935. Funds for use in purchasing the assets were made available at the Security First National Bank of Los Angeles.

(g) In the action entitled *Tally & Corbar Corporation* v. *Fox Film Corporation et al.*, brought in the United States District Court in Los Angeles in 1935, National was named as a defendant together with Fox Film Corporation, one of its parents, and a number of its subsidiaries. The object of the suit was to set aside the Fox West Coast Theatres bankruptcy proceedings. National appeared in and defended the action. National was represented by attorneys from Los Angeles and San Francisco.

(h) National maintained its insurance department in Los Angeles continuously from 1930 to the time of the institution of these actions. The head of that department was Irving Epsteen, a resident, since at least 1930, of Los Angeles. Mr. Epsteen's office was at all times maintained at 1609 West Washington Boulevard in Los Angeles. Mr. Epsteen was on the payroll of Fox West Coast Service Corporation until 1935, of Fox West Coast Agency Corporation until 1942, and thereafter of Agency, all of which companies were direct or indirect wholly owned subsidiaries of National. During the entire period Mr. Epsteen has placed all the insurance on the properties of National and its subsidiaries, as well as all liability insurance. All negotiations for insurance took place in Los Angeles, California. The contract of December 2, 1935, between Agency and Fox West Coast Agency Corporation contained the following provision with respect to insurance:

> "(b) We (Agency) will advise you as to the placing and renewal of fire, liability and other insur-

ance for your Local, Serviced and Local Holding Companies and, if requested by you, will, to the extent authorized by such Companies, contract for such insurance either by individual policies on separate properties (or risks) or by blanket policies covering all or any part of the properties (or risks) of any one or more of the Operating Companies, Holding Companies or others."

(i) In the period between 1935 and 1939 National retained and paid attorneys in California who represented National and its subsidiaries or National's subsidiaries and the trustees in bankruptcy of Fox West Coast Theatres.

(j) National's agent, Agency, carried on extensive business activities for National and its subsidiaries in California from December, 1935, to the date these actions were filed. Such activities and services were supervisory, advisory and managerial, and were of the nature Agency had agreed to perform in its contracts of December 2, 1935, with National and with Fox West Coast Agency Corporation. In general they represented services and activities which, prior to 1935, had been performed directly by National, its officers and agents.

(k) In a contract dated December 2, 1935, between Agency and Fox West Coast Agency Corporation, Agency agreed to perform substantial services for Fox West Coast Agency Corporation and the other subsidiaries of National with which it had contracts. Included among such services for theatres in California and elsewhere were the buying and booking of motion picture films, advice with respect to and the placing of insurance, advice with respect to advertising and advertising policies, contract for repairs and the furnishing of supplies and equipment when requested and to render such special services as might be needed. The contract authorized Agency to enter into contracts for and on behalf of Fox West Coast Agency and the California subsidiaries serviced by it. Agency also agreed to furnish legal and auditing services to Fox West Coast Agency Cor-

poration and the companies serviced by it. National unconditionally guaranteed the payment by Fox West Coast Agency Corporation of its obligations to Agency under this contract.

(l) In the contracts between Fox West Coast Agency Corporation and the theatre operating subsidiaries of Fox West Coast Theatres Corporation it was provided that not only should services be rendered by Fox West Coast Agency Corporation but also by Agency. The contracts specifically provided that the services of Fox West Coast Agency should also include the services of Agency.

(m) While the separate corporate entities of National's subsidiaries were maintained, National, as sole stockholder, participated in the control and operations of its subsidiaries in California during all the periods of time here involved. Its general managers were officers of the more important subsidiaries. National arranged for and participated in the subsidiaries' financing. Its officers and agents engaged in business transactions for such subsidiaries. Such transactions involved contracts directly relating to the operation of theatres in California and elsewhere.

(n) The complaints herein affirmatively allege that National controlled and dominated its subsidiaries. The subsidiaries are alleged to have acted at the behest and instigation of National and the acts alleged to have been done by National are alleged to include those done by its subsidiaries.

14. When these actions were commenced in this court on September 5, 1951, the president and sole stockholder of each of the plaintiff corporations was one H. L. Gumbiner of Los Angeles, California. He verified the complaints in each of these actions, in which verification he declared that the allegations contained in the complaints were true. In said complaints it is alleged that the plaintiffs here, during all pertinent periods of time, were the owners and operators of the Los Angeles and Tower Theatres in Los Angeles.

15. On February 2, 1935, in the United States District Court for the Southern District of California, Central Division, H. L. Gumbiner commenced an action under the anti-trust laws of the United States against Fox Film Corporation (one of the parents of the defendant National), Fox West Coast Theatres Corporation and other subsidiaries of the defendant National, the bankrupt estate of National's subsidiary Fox West Coast Theatres and the trustees in bankruptcy of that company, one of National's general managers, Charles P. Skouras, and others.

15-A. In that case H. L. Gumbiner verified the complaint, wherein he was plaintiff, and alleged that he was the operator of the Tower and Los Angeles Theatres in Los Angeles, California, and that he owned the causes of action sued upon. The Tower and Los Angeles theatres in Los Angeles, California, are the same theatres that the plaintiffs herein alleged that they owned and operated. The causes of action herein asserted are essentially the same as those which H. L. Gumbiner individually asserted in 1935.

16. Though National was not specifically named as a defendant in that action, one of its parents, several of its subsidiaries and its co-general manager, Charles P. Skouras, were named as well as several "John Doe" defendants. Skouras was a defendant both individually and as a trustee in bankruptcy of National's wholly-owned subsidiary Fox West Coast Theatres.

16-A. In the complaint filed by Gumbiner it was alleged that Charles P. Skouras had "an office and place of business" in Los Angeles and that he was "the general manager of all of the businesses" of operating the theatres which are referred to in the complaint. Such businesses included the "business" and theatres in California in which National was interested and as to which National had contracted with Skouras to act as general manager.

17. National's Board of Directors directed that Alfred Wright, a Los Angeles lawyer, be retained to represent National's subsidiaries. Skouras individually, and the trustees in bankruptcy (whom National had agreed to indemnify against any such claims). Mr. Wright, under the retainer by National, appeared for and represented National's subsidiaries, the trustees in bankruptcy and Charles P. Skouras individually. Through this retention and representation National was in control of the litigation.

18. In addition to the sworn allegations in his complaint that H. L. Gumbiner was the owner and operator of the two theatres involved, and the owner of the causes of action now asserted by the plaintiffs here, Gumbiner held himself out to be the owner and operator of the Tower and Los Angeles theatres. Exhibits introduced at the trial show that H. L. Gumbiner advertised in the Los Angeles Times that the Los Angeles theatre was individually owned and independently operated by him. The Defendants in that case had cause to believe and were justified in believing that H. L. Gumbiner operated the Los Angeles and Tower Theatres and that the causes of action asserted with respect to such theatres were owned by him.

19. On the day that H. L. Gumbiner brought his individual action, namely, February 2, 1935, National was present in the same United States District Court in Los Angeles by its officers and attorneys and on that date purchased the assets of the bankrupt estate of Fox West Coast Theatres from the trustees in bankruptcy.

20. The action brought by H. L. Gumbiner, individually, was compromised and settled. A general release was executed by him and a stipulation of dismissal with prejudice was executed by him and his attorneys on June 3, 1935, and an order of dismissal was entered thereon. As part of the settlement a subsidiary of National leased the Tower

Theatre for ten years, effective in July, 1935, at a substantial yearly rental.

20-A. On June 3, 1935, the date when H. L. Gumbiner and his attorneys executed the stipulation of dismissal of the action brought by him individually, H. L. Gumbiner owned all of the stock of the present plaintiff, Gumbiner Theatrical Enterprises, and also owned all of the stock of the present plaintiff, Bertha Building Corporation. On that date H. L. Gumbiner was also the president of both of the present plaintiff corporations.

21. The institution of the present actions by H. L. Gumbiner's wholly-owned corporations, in which he verified each of the complaints is inconsistent with the action brought by H. L. Gumbiner in his own name in 1935, in which he also verified the complaint and asserted that he owned the causes of action sued upon. The representations made by him at that time were relied upon by National to its prejudice. Further, as to the lease which was entered into by a subsidiary of National, there was no evidence that any action was ever taken by H. L. Gumbiner or the plaintiff in this case, Bertha Building Corporation, to set aside the lease, nor was there any evidence that any action has ever been taken to set aside the release which he gave or the stipulation and order of dismissal with prejudice which he signed. The two plaintiffs here and H. L. Gumbiner, by their actions and failure to act, caused National to rely to its prejudice upon the validity and binding effect of the lease, the release and dismissal with prejudice of the claims asserted by H. L. Gumbiner.

22. The plaintiffs herein, the wholly-owned corporations of H. L. Gumbiner, were in privity with H. L. Gumbiner with respect to the causes of action asserted by him, and are bound by H. L. Gumbiner's acts and representations.

23. There was no evidence that the time of the settlement of the action brought by H. L. Gumbiner in 1935, at

which time he was the sole stockholder of both plaintiffs here, any reservation was made by him or by either of such corporations of any claim or cause of action against National or any of its subsidiaries.

24. Plaintiffs were permitted to introduce in evidence certain papers and pleadings in an action filed in the Superior Court of the State of California in and for the County of Los Angeles on September 26, 1932, entitled *Jensen & von Herberg* v. *Wesco Corporation*. National, under its then name of Wesco Corporation, was named as a defendant in that case. It appears from those papers that on October 8, 1932, National made a motion to dismiss the complaint for improper venue and lack of jurisdiction. No decision with respect to that motion was ever rendered. Plaintiff voluntarily withdrew the action and subsequently refiled it, first in Delaware, and then in the Supreme Court of the State of New York, New York County, on January 4, 1934. There was no evidence that either plaintiff in these cases relied upon any position taken by National in the California proceedings. There was no evidence that plaintiffs ever knew of or were in any way misled by the filing of the motion by National or that they were at any time or in any way deterred from bringing an action against National by the filing of such motion. No element of estoppel in favor of the plaintiffs in these cases was created by the filing of the motion in the *Jensen & von Herberg* case.

25. In the period between October, 1932, and 1948 there is no evidence that National ever claimed or asserted in any judicial proceeding or otherwise that it was not subject to suit in California (except as described in finding 24). To the contrary, during that period, National appeared and actively participated in the bankruptcy proceedings of Fox West Coast Theatres in 1933-1935. It appeared and defended in the *Tally & Corbar* case in Los Angeles in 1935. It retained counsel and was in charge of the defense in the action instituted by Gumbiner in 1935.

26. Plaintiffs were also permitted to introduce in evidence certain pleadings in cases filed in California during the period from 1948 to 1951 in which National was named as a defendant. In each and all of those thirteen cases National appeared by counsel and filed its answer. In its answers National pleaded as a separate defense that venue and jurisdiction were improper as to it because, in effect it was not doing business in California. It was established by the evidence and the court finds that such defenses were pleaded in National's answers because of tax considerations. National did not wish to have on record a judicial admission that it was doing business in California which could be interpreted as an admission that its business there was of such nature as to subject it to California franchise taxes. Its subsidiaries were qualified to do business in California and paid taxes on the business done by them in California, and National maintained that its separate activities there did not constitute such business as to make it liable for additional taxes. No practical anti-trust or financial consequences attached to the assertion of these defenses by National. For in all of these thirteen cases either its parent corporation, Twentieth Century-Fox Film Corporation, or one or more of its most important subsidiaries, or both, were defendants.

27. In none of the thirteen cases was any decision ever rendered with respect to the defense set forth in the answers filed by National. In each instance, National, prior to taking any steps to litigate the issue raised by these defenses, determined to and did abandon the defenses. It was advised that in the opinion of its counsel, such a defense could not be sustained. Neither of the plaintiffs now before this court was a party to any of these thirteen cases. There was no evidence that either plaintiff at any time knew about or in any way relied upon any pleading or representation by National in those cases or that it was in any way deterred from filing a complaint against National in Cali-

fornia. No element of estoppel in favor of either plaintiff was created by the answers filed in any of the thirteen cases referred to above.

In view of other findings herein contained, the activities of National in California were such that the Statute of Limitations had run against the plaintiffs in California long before the pleadings in these thirteen actions were filed in 1948 and subsequent thereto.

28. The continuous and substantial business activities of National and its agents in California throughout the periods involved here, and particularly during the period between 1932 to July 20, 1938 (the date when the case of *United States* v. *Paramount* was filed), were such as to subject it to the jurisdiction and venue of the United States District Court in California under the venue provisions of the anti-trust laws during all of such periods. The presence and continuous business activities of National's wholly-owned subsidiaries in California, the presence and continuous activities of Charles P. Skouras as co-general manager of National, the frequent and extended business visits to California of Spyros P. Skouras, National's other co-general manager and President or Executive Vice President, and the business conducted by him there, the visits of other officers and film buyers to California to conduct business for National there, National's participation in the bankruptcy proceedings of its principal subsidiary, Fox West Coast Theatres, from 1933 to 1935, its retention of California counsel to represent its subsidiaries, the trustees in bankruptcy of Fox West Coast Theatres and Charles P. Skouras individually and its control over the activities in the litigation brought by H. L. Gumbiner in February, 1935, National's appearance in and defense of the case entitled *Tally & Corbar Corporation* v. *Fox Film Corporation, et al.*, in the California courts from 1935 to 1937, the retention and payment of attorneys for services in various cases in California, the location of its insurance department in Cali-

fornia, the business carried on in California for National by J. J. Sullivan, the performance of day to day and special services for National by John B. Bertero and others in California, and the substantial activities of Agency in California constituted the transaction of business there by National to the extent that it could have been sued in California for three years after the accrual of both causes of action asserted here and prior to the institution of the Paramount case. The claims of both plaintiffs herein are, therefore barred by the California statute of limitations.

29. National itself had not qualified to do business in California; paid no taxes to the State of California; owned no real estate in California; had no telephone or other office listing in California; had no employees in California, other than Charles P. Skouras, on its own payroll; paid no rent for any office space used by its officers and agents, and was the lessee of no real estate in California except that it was the guarantor of the lease to the Fox Theatre in San Diego, the sum total and nature of its other activities and those of its agents in California were such that had it been sued in California under the anti-trust laws at any time during the periods involved here, it could not have succeeded in establishing that venue in California was improper or that it was not subject to the jurisdiction of the Federal Courts in California.

30. Spyros P. Skouras as President and a co-general manager of National from February, 1932 to November, 1934, and as Executive Vice-President and a co-general manager from 1934 to April, 1942, continuously maintained his office at 444 West 56th Street, New York, N. Y. His office was also maintained at that address from 1942-1952, during which time he was Chairman of the Board of Directors of National. During all of these periods Mr. Skouras was also a director of National, and resided in New York.

31. Sidney R. Kent, President of National from November 14, 1934 to March, 1942, continuously maintained his office at 444 West 56th Street, New York, N. Y. During that period Mr. Kent resided in New York and was also a director of National. Other officers and directors of National continuously maintained their offices and residences in New York.

32. National's Board of Directors held all of its meetings in New York and transacted its business there from 1930 to June, 1936. From June, 1936, to January, 1944, the Board met in Jersey City, New Jersey. After January, 1944, corporate meetings were again held in New York. All meetings of National's Executive Committee were held in New York during the existence of such Committee, i.e., from December 5, 1934, to January 3, 1936.

33. National's agent, Agency, maintained an office from June, 1936, until the date these actions were begun at 444 West 56th Street, N. Y. in space rented from Twentieth Century-Fox. All officers of Agency had their offices at that address from that time until Agency opened an office in Los Angeles in August, 1942. The Board of Directors of Agency met weekly in New York.

34. From the date of its organization to the date of the institution of these actions, Agency performed substantial and continuous agency services for National and National's subsidiaries in New York. Agency maintained the payroll for its own and National's employees, kept National's books of account and performed in New York extensive supervisory, advisory, operating and managerial activities and services for National and its subsidiaries which it had agreed to perform under its contract of December 2, 1935, with National.

35. In the period between 1932 and 1942 one of Spyros P. Skouras' principal duties was acting as the head of National's film buying department in New York. He and his

assistants regularly negotiated for and entered into film licensing agreements with motion picture distributing companies in New York. Such contracts were entered into for the five or six hundred theatres operated by National's operating and agency subsidiaries. Mr. Skouras negotiated and executed such contracts as agent of the subsidiaries.

36. From 1930 throughout the period here involved, National retained and paid attorneys at law to represent it generally and specially in New York. Its general counsel was a New York firm.

37. National continuously maintained a bank account or accounts in New York from 1930 throughout the period here involved. Its main account was with The Chase National Bank of the City of New York and that bank was National's principal banker. National also had accounts with the Commercial National Bank and Trust Company, The Marine Midland Trust Company and the Guaranty Trust Company of New York.

38. National borrowed money from time to time in New York from New York banks. In 1930 National borrowed a total of $19,350,000 from The Chase National Bank in three loans. In 1931 it borrowed $15,000,000 from The Chase National Bank. In 1932 National arranged for substantial loans for its California subsidiaries from The Chase National Bank and unconditionally guaranteed payment of these loans. National hypothecated its assets with the bank in order to borrow money. As a result of those loans The Chase Bank was National's largest creditor until November, 1934, when it acquired 58 per cent. of the stock of National in exchange for the indebtedness owed to it by National and National's subsidiaries.

39. In October, 1934, National, in New York, issued debentures in the amount of $5,270,000 to Fox Film Corporation, dated as of March 4, 1933, to reflect National's

indebtedness to Fox Film Corporation. The Empire Trust Company of New York was trustee under the trust indenture. Those debentures were exchanged for stock of National in the reorganization of November 14, 1934.

40. In 1935 a line of credit in the amount of $750,000 was established with the Commercial National Bank & Trust Company of New York. Loans from that bank were negotiated in 1935 and 1937.

41. From 1930 throughout the period here involved the dividends which National received from its subsidiaries were received by it in New York and the dividends paid by National were paid in New York. National had substantial assets.

42. National itself paid no utility charges directly to any utility company. It paid a regular charge, however, to its parent Twentieth Century-Fox Film Corporation for services such as utilities, office space and the like. From and after June, 1936, payments for these facilities were made by Agency.

43. National itself did not have a telephone listing prior to the summer of 1935. Thereafter it was listed in the Manhattan telephone directory as "National Theatres Corporation, see National Theatres Agency Corporation." Prior to 1935 it had used the telephone facilities of Twentieth Century-Fox without a listing and all calls came in through the Twentieth Century-Fox switchboard. Charges for the use of these telephone facilities were included in the regular amounts paid by National to Twentieth Century-Fox.

44. National maintained an office at 26 Journal Square, Jersey City, New Jersey, from January 1, 1935, to June, 1936. At that office were located, for a year and a half, its bookkeeping and accounting department, consisting of seven or eight people, and two officers. During that period the chief operating executives of the company maintained their offices in New York. The opening of the office in New Jersey came about because of tax considerations. Neither Mr.

Skouras nor Mr. Kent ever had an office in New Jersey. The personnel of the New Jersey office were required to come to New York to advise and consult with Mr. Skouras and Mr. Kent.

45. The Jersey City office, at which was located National's accounting and bookkeeping departments, was closed in June, 1936. Meetings of National's Board of Directors were held for a brief time at that office but after December, 1936, Board meetings in New Jersey were held in the office of the manager of the State Theatre in Jersey City. National had no employees located in Jersey City after June, 1936. Soon after Twentieth Century-Fox re-acquired the Chase National Bank's interest in National and again became the sole stockholder, corporate meetings were again held in New York.

46. The business activities of National in New York throughout the period from 1930 to the date these actions were filed were substantial and continuous. Even during the period when it maintained an office in New Jersey, its main office must be held to have been in New York where its President, Executive Vice-President and other officers were located and where they carried out their functions and duties as officers of the company. The fact that this Jersey City office was sometimes referred to as National's "principal office" or "principal place of business" does not alter the actual facts as to the existence of its office and that of its executives in New York. Throughout the period that the Jersey City office was maintained, National's Board of Directors and Executive Committee met in New York. After June, 1936, National's only activities in New Jersey were the holding of meetings of its Board of Directors in Jersey City until January, 1944.

47. Plaintiffs were permitted to introduce in evidence certain papers and pleadings in *Hudside Amusement Company* v. *Warner Bros. Pictures Inc., et al.*, an action filed in the United States District Court for the Southern District

of New York in February, 1941. National was named as a defendant in that action. It appears from those papers that in March, 1941, National made a motion to dismiss (in the form of an order to show cause) for improper venue and lack of jurisdiction. It was established by the evidence and the court finds that such motion was filed because of tax considerations. No decision with respect to that motion was ever rendered. Upon advice of counsel the venue in New York was proper as to it and that it could not successfully contest the jurisdiction, National withdrew the motion and entered a general appearance. An order was entered dismissing the motion and noting that National had filed a general appearance. National subsequently answered and defended the action.

48. Neither of the plaintiffs in these cases was a party to the *Hillside* case. There was no evidence that any position taken or pleading filed by National in that case was known to or relied upon by either plaintiff in these cases. There was no evidence that plaintiffs were in any way misled by the filing of the motion by National or that they were at any time or in any way deterred from bringing an action against National by the filing of such motion. No element of estoppel in favor of the plaintiffs in these cases was created by the filing of the motion in the *Hillside* case. Furthermore, in view of the findings herein made, the activities of National in New York were such that the Statute of Limitations of New York had run against the plaintiff Gumbiner Theatrical Enterprises prior to the filing by National of any papers in the *Hillside* case.

49. There was no evidence that prior to the filing of its motion in the *Hillside* case in 1941, National had ever filed any pleadings or had made any statements or had taken any position to the effect that it was not subject to the jurisdiction of the courts of New York or that it was not amenable to suit in New York. To the contrary, in 1934, in an action entitled *Palmer v. Wesco Corporation*, it had been sued in New York in the Supreme Court, New York

County, appeared in the action, defended and eventually settled the case.

50. The court finds that the continuous and substantial business activities of National in New York throughout the periods here involved constituted the transaction of business by National in New York and subjected it to the jurisdiction and venue of the United States District Court in New York within the meaning of the anti-trust laws. With particular reference to the period from 1930 to July 20, 1938, the date when the *Paramount* case was filed, a period of more than six years after the accrual of the cause of action asserted by Gumbiner Theatrical Enterprises, National transacted business in New York and had agents there within the meaning of the venue provisions of the anti-trust laws. The court finds that the presence, continuous activities and maintenance of offices in New York by National's chief executives, Spyros P. Skouras and Sidney R. Kent, and also by Mr. Skouras as a co-general manager of National; the presence, activities and maintenance of offices in New York by other officers of National; the meetings of National's Board of Directors and Executive Committee in New York; the retention of attorneys to represent it generally and specially; the maintenance of bank accounts; the substantial loan transactions effected by National and its guarantees of loans to its subsidiaries; the entering into of various contracts in New York; the film buying activities by National on behalf of its subsidiaries; the receipt and payment of dividends in New York; the presence of its parent corporations in New York; and the substantial and continuous business activities of its agent, Agency, in New York constituted transacting business by National during that particular six-year period prior to the institution of the *Paramount* case. The court finds that National could have been sued in New York during that period and that the claim of the plaintiff Gumbiner Theatrical Enterprises is barred by the New York Statute of Limitations. The

Court further finds that National's activities in New York were such that it could have been sued in New York, under the anti-trust laws, continuously throughout the period here involved.

Conclusions of Law

1. The Statute of Limitations of California, where the alleged causes of action arose, is three years. California Code of Civil Procedure, Section 338-1.

2. Plaintiffs and defendant concede for the purposes of these cases, and the court concludes that the Statute of Limitations of New York, where these actions were instituted, is six years. Civil Practice Act of the State of New York, Section 48.

3. By virtue of Section 13 of the Civil Practice Act of the State of New York, the Statute of Limitations of the State of California, where the alleged causes arose, is applicable if defendant could have been sued in that state.

4. If the defendant was amenable to suit in California during the pertinent periods involved here, the California statute applies. If the causes of action are barred in California, they are barred in New York by Section 13 of the Civil Practice Act.

5. The cause of action alleged in the *Gumbiner Theatrical* case accrued in California on December 8, 1931. If National could have been sued in California in an anti-trust case for any period of three years thereafter and prior to July 20, 1938, the action would be barred by the California Statute of Limitations, regardless of any tolling effect of the *Paramount* case. If National could have been sued in New York in an anti-trust case for any period of six years prior to July 20, 1938, the action would also be barred by

the New York Statute of Limitations, regardless of whether barred in California, and regardless of any tolling effect of the *Paramount* case.

6. The cause of action alleged in the *Bertha Building* case accrued in California on July 4, 1935. If National could have been sued in California in an anti-trust case for any period of three years thereafter and prior to July 20, 1938, the action would be barred by the California Statute of Limitations, regardless of any tolling effect of the *Paramount* case.

7. Spyros P. Skouras was an agent of National in New York during the period from 1932-1942, within the meaning of Section 4 of the Clayton Act.

8. Charles P. Skouras was an agent of National in California during all of the periods of time here involved, within the meaning of Section 4 of the Clayton Act.

9. National Agency Corporation was an agent of National in New York after its organization in 1935, within the meaning of Section 4 of the Clayton Act.

10. Throughout all the periods of time here involved, National had one or more officers in New York upon whom service of process could have been made within the meaning of Section 19 of the Civil Practice Act of the State of New York. Section 19 did not operate to toll the New York Statute of Limitations. Defendant, moreover, was amenable to suit in New York under the venue sections of the anti-trust laws, which are the controlling venue statutes involved here.

11. The pleadings and affidavits filed by National in other cases to which plaintiffs were not parties, and which on their face were inconsistent with defendant's position here, are not conclusive upon defendant but were open to explanation and rebuttal.

12. No element of estoppel operated in these cases in favor of plaintiffs to preclude defendant from offering evi-

dence with respect to its business activities in California and New York.

13. National, within the meaning of the venue provisions of the anti-trust laws, transacted business and had agents in California for three years after the causes of action in both cases arose and could have been sued there. Both causes of action were, therefore, barred by the California three year Statute of Limitations prior to July 20, 1938.

14. The complaints must, therefore, be dismissed.

/s/ CLARENCE G. GALSTON
U. S. D. J.

Affidavit of John P. Edmondson

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 13-77

HILLSIDE AMUSEMENT COMPANY,

Plaintiff,

against

WARNER BROS. PICTURES, INC., et al.,

Defendants.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

JOHN P. EDMONDSON, being duly sworn, deposes and says:

1. I am Secretary of National Theatres Corporation.

2. I am authorized by National Theatres Corporation to make this affidavit on its behalf in support of its order to show cause why the complaint should not be dismissed and the purported service of a summons and complaint quashed as to it.

3. I am familiar with the facts herein.

4. On February 25, 1941, a Deputy United States Marshal for the Southern District of New York attempted service of a summons and complaint in the above entitled action upon me at 444 West 56th Street, New York, N. Y., by leaving with me a copy of the complaint, together with the summons.

5. National Theatres Corporation is a Delaware corporation. Its principal place or business is 2854 Hudson Boulevard, Jersey City, New Jersey. National Theatres Corporation does not maintain an office in the territorial jurisdiction of the Southern District of New York. National Theatres Corporation is a holding company. It engages in no business other than holding stock and other securities. All securities owned by it are kept in vaults in Jersey City, New Jersey. It maintains an office in Jersey City, New Jersey, at which all directors' meetings, stockholders' meetings and meetings of the auditing committee are held. Its stock record books are kept in Jersey City, New Jersey.

6. I have an office at 444 West 56th Street, New York, N. Y., where the summons and complaint were purportedly served upon me. That office is not the office of National Theatres Corporation. National Theatres Corporation does not own the building and it does not pay the rent. The office is maintained by Twentieth Century-Fox Film Corporation, of which I am an assistant secretary. I transact no business for National Theatres Corporation in the Southern District of New York.

7. None of the officers, directors, or employees of National Theatres Corporation maintains an office as an officer, director or employee of National Theatres Corporation in the Southern District of New York. None of the officers, directors or employees of National Theatres Corporation transacts any business on behalf of National Theatres Corporation in the Southern District of New York.

8. National Theatres Corporation is not qualified to do business in the State of New York.

9. National Theatres Corporation does not maintain an office of any sort in New York, N. Y., or anywhere else within the territorial jurisdiction of the District Court of the United States for the Southern District of New York. At all times since December 29, 1934, the principal office

of National Theatres Corporation has been in Jersey City, New Jersey. No meetings of stockholders, directors, or of the auditing committee are held in the Southern District of New York.

10. National Theatres Corporation is not engaged in the exhibition of motion pictures. It does not engage in the business of buying or selling any commodity. It does not enter into license agreements for the exhibition of motion pictures in the Southern District of New York or anywhere else.

11. While National Theatres Corporation is a holding company, it owns no interest, directly or indirectly, in any theatre within the territorial jurisdiction of the District Court of the United States for the Southern District of New York.

12. I have consulted the General Counsel for National Theatres Corporation, Messrs. Dwight, Harris, Koegel & Caskey, No. 100 Broadway, New York, N. Y. and have been advised by them that in their opinion National Theatres Corporation does not transact business within the territorial jurisdiction of the District Court of the United States for the Southern District of New York; and that it is not an inhabitant nor can it be found within the territorial jurisdiction of said court.

WHEREFORE I respectfully pray that the purported service of summons and complaint in the above entitled action upon National Theatres Corporation be quashed and that the complaint be dismissed as to National Theatres Corporation.

JOHN P. EDMONDSON

(Sworn to March 13, 1941.)

Affidavit of William W. Owens

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil Action File No. 13-77

HILLSIDE AMUSEMENT COMPANY,

Plaintiff,

against

WARNER BROS. PICTURES, INC., *et al.*,

Defendants.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

WILLIAM W. OWENS, being duly sworn, deposes and says:

I am a member of the firm of Dwight, Harris, Koegel & Caskey, attorneys for National Theatres Amusement Corporation, which appears specially herein for the purpose of contesting the jurisdiction of the Court. This affidavit is in reply to the affidavit of Norman H. Samuelson, Esq., sworn to June 14, 1941.

Mr. Samuelson says that from information in his possession he is convinced that the principal office of National Theatres Corporation was, until a date after service of the summons and complaint herein, located at 444 West 56th Street, New York City. He does not state the source or nature of his information. My firm have represented National Theatres Corporation since June 10, 1937. I state of my own knowledge that National Theatres Corporation has not at any time since June 10, 1937 down to the date of this affidavit had an office or place of business at 444 West

56th Street or anywhere else within the Southern District of New York.

Mr. Samuelson also says that he is informed that National Theatres Corporation, through affiliated and associated companies, has interests in theatres which operate within the territorial limits of this Court. Again he does not state the source or nature of his information. I state of my own knowledge that neither National Theatres Corporation nor any subsidiary or sub-subsidiary has had any interest in any theatre within the Southern District of New York since June 10, 1937 and I know of no interest which it ever had in any such theatre before that date. With the exception of a few theatres in Illinois, Wisconsin and Michigan, all theatres operated by the subsidiaries and affiliates of National Theatres Corporation are west of the Mississippi River. It has a wholly owned subsidiary which owns a theatre in Philadelphia but that theatre has been leased to independent interests for the past five years.

At the hearing I asked Mr. Samuelson to name any theatre in the Southern District of New York in which he thought National Theatres Corporation or any of its subsidiaries or affiliates had an interest. He named the Roxy theatre in New York City. I state from my own knowledge that neither National Theatres Corporation nor its subsidiaries has ever had any interest in the Roxy theatre or has had anything to do with the ownership or management thereof.

From the above it is not only apparent that National Theatres Corporation is not subject to the jurisdiction of this Court but it is also apparent that plaintiff, which operates in the State of New Jersey, cannot possibly have any grievance against National Theatres Corporation inasmuch as it operates no theatres and the nearest theatre operated by any of its subsidiaries is in Detroit, Michigan.

On May 5 the plaintiff procured an order from Judge Mandelbaum granting it leave to examine the various defendants regardless of the fact that none had yet an-

swered. In his affidavit in support of that application Mr. Samuelson said that all defendants except National Theatres Corporation had appeared generally. With respect to National Theatres Corporation he said the following:

> "With particular reference to defendant National Theatres Corporation, this defendant challenges the jurisdiction of the Court over its person by reason of the fact that it alleges that it is not doing business within the Southern District of New York nor that it can be found here. An examination of its agents and representatives is essential so that evidence may be procured out of the mouths of its own agents to contradict its affidavits and to sustain the jurisdiction of this Court."

At the hearing on the present motion the Court inquired of Mr. Samuelson whether he had been stayed from proceeding to examine defendant under Judge Mandelbaum's order of May 5th and Mr. Samuelson told the Court that he had been stayed. That is not so. No effort has ever been made to examine National Theatres Corporation pursuant to Judge Mandelbaum's order and National Theatres Corporation has never made any effort to stay such an examination. The brief which Mr. Samuelson filed with the Court on the present motion bears me out. In referring to Judge Mandelbaum's order of May 5 Mr. Samuelson's brief says at page 3:

> "Although other defendants have challenged the aforesaid order, which is treated in a separate memorandum on their motions to vacate said order, this defendant has made no motion with reference thereto. Apparently the right of the plaintiff to take oral testimony in support of the jurisdiction of this court over the person of said defendant, is conceded."

In summary the papers on the present motion were served on March 15. The plaintiff has had sixteen weeks

to seek evidence to disprove our contention that National Theatres Corporation cannot be found within this district. The fact that it has not put any such evidence before the Court makes it apparent that it has found none. The plaintiff now asks the Court to give it an opportunity to take depositions on the subject. But it has had that opportunity for more than two months and has done nothing about it.

It is respectfully submitted that plaintiff has had ample time to make its investigation and that the motion to vacate the service of the summons should now be granted.

WILLIAM W. OWENS.

(Sworn to July 9, 1941.)

Affidavit of H. C. Cox

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil Action File No. 13-77

HILLSIDE AMUSEMENT COMPANY,

Plaintiff,

against

WARNER BROS. PICTURES, INC., *et al.*,

Defendants.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

H. C. Cox, being duly sworn, deposes and says:

I am the Treasurer of National Theatres Corporation. I have read the affidavit of John P. Edmondson sworn to on March 13, 1941 and the affidavit of William W. Owens sworn to on July 9, 1941, both in support of the motion to vacate the service of the summons on National Theatres Corporation in the above entitled action. The statements contained in those affidavits are true to my knowledge.

I have also read the opposing affidavit of Norman H. Samuelson sworn to on June 14, 1941 and in answer to paragraph 6 of that affidavit I state of my own knowledge that National Theatres Corporation has never entered into any license agreements for motion pictures either within the Southern District of New York or at any other place.

H. C. Cox.

(Sworn to July 9, 1941.)

Plaintiffs' Exhibit 31

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Civil Action No. 12073

GUMBINER THEATRICAL ENTERPRISES, INC.,

Plaintiff,

against

NATIONAL THEATRES CORPORATION,

Defendant.

Civil Action No. 12074

BERTHA BUILDING CORPORATION,

Plaintiff,

against

NATIONAL THEATRES CORPORATION,

Defendant.

Attached are extracts from papers on file in the United States District Court for the Southern District of New York in a case entitled *United States* v. *Paramount, et al.*, Equity No. 87-273, in evidence pursuant to colloquy between Court and counsel, appearing at R. 556-558:

Petition filed July 20, 1938, page 18, paragraph (7)(e):

"National Theatres Corporation, 42% of the capital stock of which is owned and controlled by Twentieth Century-Fox Film Corporation, is a corporation organized and existing under the laws of the State of Delaware, with a place of business at 444 West

56th Street, New York, New York, and is a holding company for the theatre interests of the said Twentieth Century-Fox Film Corporation."

Answer of National Theatres Corporation dated June 29, 1939, page 2, paragraph 4(b):

"Answering paragraph '7(e)' of the petition, deny that National Theatres Corporation (herein sometimes called 'National') is a holding company for the theatre interests of Fox, or that National has a place of business at 444 West 56th Street, New York, N. Y., and aver that its place of business is at 2854 Hudson Boulevard, Jersey City, New Jersey."

Upon the last page of said answer, page 16, there appears:

"DWIGHT, HARRIS, KOEGEL & CASKEY,
Solicitors for Defendants:
National Theatres Corporation,
Spyros P. Skouras,
A. S. Gambee,
H. C. Cox and
John P. Edmondson.
Office and P. O. Address,
100 Broadway,
Borough of Manhattan,
New York City.

June 29, 1939.

JOHN F. CASKEY,
A member of said firm."